# INDEX


| | Page |
|---|---|
| Opinion | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Summary of argument | 14 |
| Argument | 24 |
| I. The trial court did not commit prejudicial error by refusing, in its discretion, to compel production of the F. B. I. reports sought by petitioner | 24 |
| A. No proper foundation for the compulsory production of the reports was laid by petitioner | 26 |
| 1. Requests for production of reports during the trial | 26 |
| a. Request for Matusow's reports relating to conversations in July, 1950 | 26 |
| b. Request for Ford's reports | 32 |
| 2. Requests for production of reports during the hearing | 33 |
| a. Request for agent Crandall's report | 33 |
| b. Request for Matusow's reports to agent Burttram | 36 |
| B. In any event, the trial court's refusal to compel production of the reports was not prejudicial | 39 |
| II. The trial court properly charged the jury on the issues of membership and affiliation | 44 |
| A. Instruction on membership | 44 |
| B. Instruction on affiliation | 55 |
| III. The jury was properly charged on the issue of the credibility of informants | 59 |
| Conclusion | 63 |
| Appendix | 64–71 |




399866—56——1

## CITATIONS

Cases: Page

*Alford* v. *United States*, 282 U. S. 687 ..... 25
*American Communications Association* v. *Douds*, 339 U. S. 382 ..... 24, 50, 55, 58
*Arnstein* v. *United States*, 296 Fed. 946, certiorari denied, 264 U. S. 595 ..... 25, 30
*Bates* v. *Preble*, 151 U. S. 149 ..... 39
*Beaty* v. *United States*, 203 F. 2d 652, remanded to C. A., 348 U. S. 905–906 ..... 38
*Boehm* v. *United States*, 123 F. 2d 791, certiorari denied, 315 U. S. 800 ..... 38
*Bowman Dairy* v. *United States*, 341 U. S. 214 ..... 31
*Bridges* v. *Wixon*, 326 U. S. 135 ..... 22, 57, 59
*Brooks* v. *United States*, 267 U. S. 432 ..... 57
*Caminetti* v. *United States*, 242 U. S. 470 ..... 60
*Christoffel* v. *United States*, 200 F. 2d 734; reversed on other grounds, 345 U. S. 947 ..... 30
*Collier* v. *United States*, 190 F. 2d 473 ..... 62
*Communist Party* v. *Subversive Activities Control Board*, 1955 Term, No. 48 ..... 46
*Colyer* v. *Skeffington*, 265 Fed. 17 ..... 46
*D'Aquino* v. *United States*, 192 F. 2d 338, certiorari denied, 343 U. S. 935 ..... 25, 30
*Dennis* v. *United States*, 341 U. S. 494 ..... 46
*DiCarlo* v. *United States*, 6 F. 2d 364, certiorari denied, 268 U. S. 706 ..... 38
*Ellicott* v. *Pearl*, 10 Pet. 412 ..... 38
*Erie R.* v. *Kane*, 118 Fed. 223, certiorari denied, 207 U. S. 593 ..... 42
*Fisher* v. *United States*, 231 F. 2d 99 ..... 30, 49, 50, 54, 56, 57, 59
*Fletcher* v. *United States*, 158 F. 2d 321 ..... 61
*Frankfeld* v. *United States*, 198 F. 2d 679, certiorari denied, 344 U. S. 922 ..... 46
*Galvan* v. *Press*, 347 U. S. 522 ..... 20, 45, 46, 47, 48, 49, 50, 58
*Glasser* v. *United States*, 315 U. S. 60 ..... 25, 62
*Goins* v. *United States*, 99 F. 2d 147, writ of certiorari dismissed, 306 U. S. 622 ..... 38
*Goldberg* v. *United States*, 213 F. 2d 734 ..... 38
*Goldman* v. *United States*, 316 U. S. 129 ..... 15, 25
*Gordon* v. *United States*, 344 U. S. 414 ..... 15, 16, 17, 18, 19, 27, 28, 29, 30, 34, 37, 38, 39, 40

Cases—Continued


| | Page |
|---|---|
| *Gunning* v. *Cooley*, 30 F. 2d 467, affirmed, 281 U. S. 90 | 39 |
| *Harrison* v. *United States*, 7 F. 2d 259 | 41, 43 |
| *Harrison* v. *United States*, 191 F. 2d 874 | 43 |
| *Hickman* v. *Taylor*, 329 U. S. 495 | 31 |
| *Hirabayashi* v. *United States*, 320 U. S. 81 | 57 |
| *Holt* v. *United States*, 218 U. S. 245 | 61 |
| *Hupman* v. *United States*, 219 F. 2d 243, certiorari denied, 349 U. S. 953 | 24, 45, 48, 49, 54 |
| *Interstate Circuit* v. *United States*, 306 U. S. 208 | 43 |
| *Kates* v. *United States*, Nos. 6, 7, 8, this term | 45 |
| *Larrison* v. *United States*, 24 F. 2d 82 | 41 |
| *Little* v. *United States*, 93 F. 2d 401, certiorari denied 303 U. S. 644 | 25, 30 |
| *Maggio* v. *Zeitz*, 333 U. S. 56 | 53 |
| *Martin* v. *United States*, 17 F. 2d 973, certiorari denied, 275 U. S. 527 | 41 |
| *Matusow* v. *United States*, 229 F. 2d 335 | 14 |
| *Michelson* v. *United States*, 335 U. S. 469 | 25 |
| *Osman* v. *Donds*, 339 U. S. 846 | 24 |
| *People* v. *Shilitano*, 218 N. Y. 161 | 41 |
| *Rowoldt* v. *Perfetto*, No. 34, this term | 48 |
| *Scanlon* v. *United States*, 223 F. 2d 382 | 31, 43 |
| *Schneider* v. *United States*, 57 F. 2d 454 | 62 |
| *Shelton* v. *United States*, 205 F. 2d 806 | 29, 34 |
| *Stockyards Loan Co.* v. *Nichols*, 260 Fed. 393, certiorari denied, 245 U. S. 668 | 39 |
| *Sugarman* v. *United States*, 249 U. S. 182 | 61 |
| *Tot* v. *United States*, 319 U. S. 413 | 53, 54 |
| *United States* v. *Beekman*, 155 F. 2d 580 | 43 |
| *United States* v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U. S. 799 | 29 |
| *United States* v. *Dennis*, 183 F. 2d 201, affirmed, 341 U. S. 494 | 60, 61, 62 |
| *United States* v. *DeNormand*, 149 F. 2d 622, certiorari denied, 326 U. S. 756 | 29 |
| *United States* v. *Ebeling*, 146 F. 2d 254 | 29 |
| *United States* v. *Flynn*, 130 F. Supp. 412 | 31, 43 |
| *United States* v. *Johnson*, 327 U. S. 106 | 20, 41, 42, 43 |
| *United States* v. *Krulewitch*, 145 F. 2d 76, reversed on other grounds, 336 U. S. 440 | 26, 29, 34 |

Cases—Continued


| | Page |
|---|---|
| *United States* v. *Levy*, 153 F. 2d 995 | 62 |
| *United States* v. *Lightfoot*, 228 F. 2d 861, pending on writ of certiorari, No. 32 | 30 |
| *United States* v. *Remington*, 191 F. 2d 246, certiorari denied, 343 U. S. 907 | 30 |
| *United States* v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 345 U. S. 965 | 60 |
| *United States* v. *Sheridan*, 329 U. S. 379 | 22, 56 |
| *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 | 25, 39 |
| *United States* v. *Troche*, 213 F. 2d 401 | 41, 42 |
| *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99 | 38, 39 |
| *Weiss* v. *United States*, 122 F. 2d 675, certiorari denied, 314 U. S. 687 | 42 |
| *Wright* v. *United States*, 175 F. 2d 384, certiorari denied, 338 U. S. 813 | 61 |
| *Yates* v. *United States*, Nos. 6, 7, 8, this term | 46 |
| Statutes: | |
| Communist Control Act of [August 24,] 1954, § 5, c. 886, 68 Stat. 777, 50 U. S. C. (Supp. III) 844 | 20, 46 |
| Federal Rules of Criminal Procedure: | |
| Rule 16 | 30 |
| Rule 17 (c) | 31 |
| Rule 30 | 53, 55 |
| Rule 42 | 14 |
| Rule 52 | 19, 39 |
| Immigration and Nationality Act of June 27, 1952, § 22, as amended, c. 477, 66 Stat. 163, 204, 241 (a) | 45 |
| Internal Security Act of 1950, § 4 (f), c. 1024, 64 Stat. 987, 1006, 50 U. S. C. § 783 (f) | 45, 54 |
| National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, § 9 (h), 61 Stat. 146, 29 U. S. C. 159 (h) | 3, 15, 20, 21, 23, 24, 47, 48, 50, 55, 56, 57 |
| Revised Rules of the Supreme Court: | |
| Rule 40 (1) (d) (2) | 55 |
| 8 U. S. C. 137 | 57 |
| 18 U. S. C. 1001 | 2, 4, 55 |
| Miscellaneous: | |
| 5 A. L. R. 2d 912 | 43 |
| II Wigmore, Evidence (3d ed.) § 288 | 43 |
| III Wigmore, Evidence (3d ed.) § 738 | 39 |

# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 23

CLINTON E. JENCKS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of conviction (R. 500–521)[1] is reported at 226 F. 2d 540. The opinion of the Court of Appeals affirming the order of the District Court denying petitioner's motion for a new trial (H. 833–847) is reported at 226 F. 2d 553.

[1] "R." refers to the record of the trial on the merits printed for this Court; "Tr." refers to the original transcript of the record at the trial on the merits; "H." refers to the record of the hearing on the motion for a new trial printed for the court below and filed with this Court; "Br." refers to petitioner's brief; "Pet." refers to the petition for a writ of certiorari; and "Govt. Ex." refers to Government exhibits.

## JURISDICTION

The judgments of the Court of Appeals were entered on October 26, 1955. Petitions for rehearing were duly filed, and were denied on December 1, 1955. The petition for a writ of certiorari was filed on December 28, 1955, and was granted on March 5, 1956, as to questions 1, 2, 3, 4, 5, and 7 presented in the petition. 350 U. S. 980. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether, in the circumstances of the case, the trial court committed a prejudicial abuse of discretion in denying petitioner's several motions for the production of F. B. I. reports by or about witnesses who testified for the Government at the trial.

2. Whether, in this prosecution for having knowingly filed a false non-Communist affidavit pursuant to Section 9 (h) of the Labor Management Relations Act, the trial court properly charged the jury as to the nature of membership in, and affiliation with, the Communist Party.

3. Whether the trial judge properly charged the jury on the issue of the credibility of informants who testified at the trial.

## STATUTES INVOLVED

The pertinent provisions of the statutes involved are:

18 U. S. C. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes or

uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9 (h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 146, 29 U. S. C. 159 (h):

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, * * * and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

## STATEMENT

Petitioner was convicted on both counts of a two-count indictment, returned on April 20, 1953, in the United States District Court for the Western District

of Texas (R. 1–2), alleging the violation of the false statement statute, 18 U. S. C. 1001, *supra,* pp. 2–3. Each count charged that petitioner made false statements to the National Labor Relations Board in an Affidavit of Non-Communist Union Officer (National Labor Relations Board Form 1081) which he executed on April 28, 1950, and filed with the Board on May 1, 1950. Count One charged that petitioner falsely stated in the affidavit that he was not then a member of the Communist Party (R. 1), and Count Two charged that he falsely stated that he was not then affiliated with the Communist Party (R. 1–2).

The affidavit (Govt. Ex. 1, R. 383) was executed and filed by petitioner, pursuant to the requirements of 29 U. S. C. § 159 (h), as president of Local 890 of the International Union of Mine, Mill, and Smelter Workers (hereinafter referred to as Mine-Mill Union).[2] Subsequently, petitioner signed and filed with the National Labor Relations Board a complaint on behalf of his union, against one of the employers having a contract with his union (R. 406), which complaint was duly processed by the Board (R. 23–24). The complaint was executed by petitioner and could not have been processed had he not filed his non-Communist affidavit of April 28, 1950 (R. 24–25).

Petitioner's connection with the Communist Party was developed through the testimony of eight Government witnesses, six of whom had formerly been mem-

[2] The Union is the bargaining agent for the major nonferrous metal mining companies in the United States and Canada as well as for a number of companies producing uranium ore (H. 471–472). The Union has approximately 80,000 members in the United States and approximately 32,000 in Canada (H. 471).

bers of the Party. The evidence adduced by the Government may be summarized as follows:

Edward Currie, a former Party member (R. 195–198), testified that in April, 1946, petitioner attended a Communist Party meeting at the home of Arthur Bary,[2a] Chairman of the Communist Party of Colorado (R. 85–86). At this meeting, Bary delivered a report to the effect that it was essential for Communist Party members who were veterans of World War II to join veterans' organizations to further the aims of the Communist Party (R. 88). Petitioner also delivered a report in which he stated that there were too many Party members in the American Veterans Committee and that they should spread themselves into other veterans' organizations (R. 88). Only through such activity on the part of Communist Party members in the various veterans' organizations, he further stated, could the problems facing veterans nationally be brought to the fore and met (R. 89).

George Knott, a former member of the Communist Party (R. 204), identified petitioner as being a Communist Party member in 1946, when petitioner was hired by the Mine-Mill Union as a business agent for its local unions in the Silver City-Bayard, New Mexico, area (R. 205–206). In late 1946 or early 1947, petitioner discussed with Knott, Orville Larson (Board member of the Union), and Morris Graham (Communist Party Organizer for the Arizona and New Mexico area), plans for the organization of a strong Communist Party group in each of the local unions in the Silver City area (R. 210). Petitioner

[2a] An apparent error has caused Bary's name to be spelled as Barry in the record.

was instructed that Party dues would be payable at the Phoenix office (R. 210).

Clay M. Brooks testified that in the spring of 1947, when he was a neighbor of petitioner, petitioner had stated that he was a Communist and proud of it (R. 201).

James E. Peterson, a former member of the State Central Committee of the Communist Party of Utah (R. 211–212), testified that in late 1947 or early 1948 he attended a closed Communist meeting with the petitioner at the Hotel Utah in Salt Lake City in connection with a mining, smelting, and refining conference of the Mine-Mill Union (Tr. 739–740).

Peterson also met petitioner at the Rocky Mountain Convention of the Communist Party held in Denver, Colorado, in the winter of 1947–1948 (R. 219–220). At this meeting, petitioner was appointed a member of a committee to promote the interests of the Mexican-Americans in order to bring them into the Communist Party and the labor movement and to help provide a strong foundation on which to carry out the Communist Party program (R. 223–224).

Peterson further testified that sometime during the month of May or June, 1948, petitioner attended another meeting of Communist Party members in Denver, Colorado (R. 212–220). This meeting was called to discuss strategy relative to the secession of opposition elements from the union (R. 214–226). The Labor Management Relations Act was also discussed and the members were instructed that it was the policy of the Communist Party at that time not to sign the non-Communist affidavits (R. 226–227, 237–238).

Subsequently, on September 15, 1949, petitioner executed and filed with the National Labor Relations Board a non-Communist affidavit as required by the Act (Govt. Ex. 7, R. 19–20, 395). Immediately thereafter, in the October, 1949, issue of the *Union Worker*, a union newspaper of which petitioner was editor (R. 373), petitioner published an editorial statement, over the names of himself and the other local union officers, entitled "What the Next C. I. O. Convention Means to Our Union." The statement reported that President Murray had threatened to expel petitioner's union from the C. I. O. and that the union had suffered greatly from raids by other unions. The statement further said (R. 375):

> * * * Now that our Union has signed the phony affidavits we can defend ourselves on a ballot in case of raids. We do not fear attack from that quarter any longer.

Kenneth Eckert, from 1931 to 1948 a member of the Communist Party, and from 1946 to 1948 a member of the Communist Party Steering Committee in the Mine-Mill Union, testified that he first met petitioner at a meeting of the Steering Committee held in Chicago in August, 1947 (R. 327–328).[3] At this meeting, petitioner urged that Chesley Smotherman be elected vice-president of the Union inasmuch as he could be depended upon to carry out the instructions of the Communist Party. (R. 331). Eckert again met peti-

[3] Gilbert Green, State Secretary of the Communist Party of Illinois, and Fred Fine, Trade Union Secretary of the Communist Party of Illinois, were also present at this meeting (R. 329). An apparent error has caused Fine's name to be spelled as Finn in the record.

tioner later that month at Communist Party meetings in St. Paul (R. 332–335), where petitioner again urged that Smotherman be elected as vice president (R. 913–914).[4]

J. W. Ford was a member of the Communist Party in New Mexico from 1948 until September 1950 (R. 94, 114). He testified that he saw petitioner at Albuquerque, New Mexico, in August, 1948, at the home of Joseph DiSanti, then chairman of the Communist Party in Albuquerque (R. 100). Petitioner and all the other persons attending this meeting were identified as members of the Communist Party (R. 101).

Ford next met petitioner in February, 1949, at a meeting in Santa Fe, New Mexico (R. 101). At this meeting, petitioner and his wife were among the delegates chosen to attend a meeting of the Mexican-American Association to be held in Phoenix, Arizona (R. 102). All delegates chosen were identified as Communist Party members (R. 102).

Ford testified that in early 1949 the Communist Party in New Mexico was divided into two main groups: the northern section headed by Joseph DiSanti and the southern section headed by petitioner (R. 104). At a Communist Party meeting held in Hot Springs, New Mexico, in April, 1949, petitioner

[4] Eckert testified that the Communist Party had different types of membership, including "membership at large" which was reserved for Communist Party members who occupied strategic positions in labor unions and other organizations where public knowledge of their Communist Party membership would jeopardize their positions in the organization (R. 335–336). Eckert also pointed out that the Communist Party did not keep minutes of its meetings (R. 336).

was assigned to carry out the Communist Party's interest in labor (R. 106). In accepting this task, petitioner pledged strong support to the state organization of the Communist Party and stated that he would concentrate mainly on recruiting Communist Party members from the labor forces in his area and that he would particularly see that greater financial support be given the Communist Party (R. 106). Also, at this meeting, DiSanti was elected as organizer of the Communist Party in the State of New Mexico (R. 106).

In May, 1949, Ford again met petitioner at a Communist Party meeting held in DiSanti's home in Albuquerque, New Mexico (R. 108). At this meeting, petitioner stated that he was having success in recruiting Communist Party members among the labor forces. He also advised that he would report regularly to the Chairman of the State Board of the Communist Party on monies collected and that his union newspaper would be open to support issues of concern to the Communist Party (R. 108).

In August, 1949, at a ranch near Santa Fe, New Mexico, petitioner attended another meeting of Communist Party leaders (R. 109). The meeting was called by DiSanti to prepare for a forthcoming meeting of the Mexican-American Association in Albuquerque (R. 109). DiSanti instructed all present to give vigorous support to the forthcoming meeting, but not to be conspicuous (R. 110–111). Petitioner subsequently attended the Albuquerque meeting, also held in August, 1949 (R. 110–111). During the course of the meeting, a resolution calling for the Association

publicly to disavow Communist support, and to condemn any organization that advocated the violent overthrow of the United States Government, was defeated (R. 111). Petitioner's wife led the opposition to this resolution (R. 112–113).

Ford continued his membership in the Communist Party until his departure from Albuquerque in September, 1950 (R. 114). Not only was he a member of the State Board of the Communist Party, but he also was one of the security officers for the Party in the State of New Mexico (R. 115). To his knowledge, during the period from 1949 through September, 1950, no disciplinary action was ever taken by the Communist Party against petitioner (R. 119) and petitioner had not been replaced as a member of the State Board of the Communist Party (R. 133).

Harvey Matusow, a member of the Communist Party from 1947 until 1951 (R. 241, 252), testified with respect to several conversations he had had with petitioner at a ranch near Taos, New Mexico, in July and August, 1950 (R. 243–251). At no time during his testimony, however, did Matusow ever state that petitioner was a Communist.

The first conversation took place in the latter part of July (R. 243–244) in the presence of Abraham Marcus. Matusow stated that he had left New York permanently and was considering living in either New Mexico or California, in which event he would transfer his Communist Party membership. Petitioner remarked that it was a good idea and that "we can use more active Communists out here" (R. 244–245).

In a subsequent conversation with petitioner concerning Party activities, Matusow told him that he had just spoken to DiSanti, the State organizer, concerning expediting the transfer of his Party membership from New York City to New Mexico. Petitioner remarked that it was a good idea, "We can use you out here, we need more active Party members" (R. 245).

During the same conversation, petitioner stated that he was preparing a lecture to deliver at the ranch concerning the Stockholm Peace Appeal, and inquired of Matusow what he and his fellow Communists in New York were doing in that regard (R. 245). Matusow described the activities being performed in New York and also discussed a "Do-Day" program inaugurated by the Party. The purpose of this program was to utilize the interim between Communist Party meetings by encouraging Party members to put into action the matters which they had discussed during the preceding week (R. 245–246). Petitioner considered this a very good idea and planned to mention "Do-Day" in his lecture, and would attempt also to put the plan into operation among his fellow Party members in Silver City (R. 246). Petitioner also stated that while in Mexico he had visited some Communist union organizers connected with the Mexican Miners Union and that they were trying to arrange for their contracts, both in Mexico and the United States, to expire at the same time so that they would be in a position to cut off or at least slow down all mining and smelting in basic metal production in an attempt to interfere with the Korean hostilities effort (R. 246).

Several days later, petitioner delivered the proposed lecture, discussing the role of the trade unions, the drive for peace, and the Stockholm Peace Appeal (R. 246–247).[5] During the lecture, petitioner extolled the Soviet Union's plan for disarmament and for putting an end to the Korean conflict. On the other hand, he spoke deprecatingly of the United States as the aggressor in Korea. Reference was made also to "Do-Day," a day of no meetings but just action (R. 247). Petitioner then asked those present to read the *Daily People's World* and certain pamphlets relating to the Stockholm Peace Appeal (R. 249–250).[6]

During a third conversation, Matusow told petitioner that he had joined the Taos, New Mexico, chapter of the Mexican-American Association (R. 251). Petitioner responded that this was proper Communist Party work and that he himself was active in the Mexican-American Association in the Silver City area. He explained that the Association was a key organization as far as Communist activities were concerned in New Mexico, and that the Communist Party controlled the organization, using it as a political propaganda sounding board and as an instrument in cementing fraternal and working relations with the Communist Party and the Mexican Miners Union (R. 251).

---

[5] Matusow stated that the lecture took place in the library of the ranch which contained many books and periodicals published by the Communist Party, including the magazine *Political Affairs* and the newspaper the *Daily People's World* (R. 247).

[6] The *Daily People's World* was identified by several witnesses as the Communist Party newspaper on the West Coast (R. 211, 249–250, 342).

Jesus Terrazas, a former member and shop steward in petitioner's union (R. 345), testified that issues of the *National Guardian* and *Daily People's World* were kept in the union hall of Local 890 (R. 347), and that on many occasions in 1950, 1951, and 1952, petitioner encouraged the union members to read the *Daily People's World*. Petitioner urged that it was the only newspaper that brought the truth to the people, as the other newspapers were controlled by capitalists (R. 347–348).

Additional facts relevant to the procedural rulings, as well as the portions of the trial court's charge contested by petitioner, are, in the interest of brevity and clarity, set forth in course of the Argument, *infra*.

Petitioner adduced no evidence in rebuttal, other than documents showing his war record or establishing his place of residence in New Mexico during the period June to December, 1947 (Tr. 1027–1048).

The jury returned a verdict of guilty on both counts and petitioner was sentenced to imprisonment for five years on each count, the terms to run concurrently (R. 466–468).

On January 28, 1955, while the appeal was pending, a motion for a new trial on grounds of newly discovered evidence was filed in the District Court. Attached to the motion was an affidavit by Harvey Matusow recanting certain statements he had made in his testimony at the trial. At the hearing on the motion, Matusow elaborated on these denials, and the Government produced ten witnesses and eighteen ex-

399866—56——2

hibits in rebuttal.[7] After due consideration of all the evidence, the court denied the motion on March 12, 1955 (R. 825–826).[8]

On October 26, 1955, the Court of Appeals unanimously affirmed the conviction of petitioner on both counts of the indictment (R. 522), and similarly affirmed the judgment of the District Court denying petitioner's motion for a new trial (H. 847). In connection with the latter decision, the court held, *inter alia*, (a) that the evidence supported the trial court's finding that Matusow testified truthfully at the trial and that his recantation was false (H. 842), and (b) that, in any event, "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow" and "that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness" (H. 844).

## SUMMARY OF ARGUMENT

This case involves a conviction of making false statements in a non-Communist affidavit filed pur-

---

[7] A summary of the evidence adduced at the hearing on the motion is contained in the Appendix, *infra*, pp. 64–71.

[8] After the ruling on petitioner's motion, the trial court cited Matusow for contempt for obstructing justice (H. 819–820). Following a hearing held four days later, Matusow was adjudged guilty of contempt and sentenced to three years' imprisonment. On appeal, the conviction was reversed on the ground that the requirements of Rule 42, F. R. Crim. P., had not been met. *Matusow* v. *United States*, 229 F. 2d 335 (C. A. 5). The same panel of the Fifth Circuit decided the *Matusow* case as had decided both of the *Jencks* appeals.

suant to Section 9 (h) of the Labor Management Relations Act of 1947. Petitioner attacks the refusal of the trial court to compel the production of certain F. B. I. reports and the adequacy of the charge. Petitioner does not challenge the sufficiency of the evidence to support his conviction; nor does he challenge the sufficiency of the evidence to support the denial of his motion for a new trial.

I

Petitioner contends that the court below erred in affirming the trial court's refusal, both at the trial and at the hearing on petitioner's motion for a new trial, to order the production of F. B. I. reports by or concerning two witnesses who testified for the Government at the trial. This Court has repeatedly emphasized that a "large discretion must be allowed the trial judge" with respect to the production of documents, and in the absence of prejudicial abuse, the exercise of that discretion will not be upset. *Goldman* v. *United States*, 316 U. S. 129, 132; *Gordon* v. *United States*, 344 U. S. 414. There was no such abuse here.

A. 1. During the trial, petitioner elicited testimony that Matusow and Ford had reported to the F. B. I. with respect to their relations with petitioner. Without attempting to develop a foundation for his requests, petitioner asked that all such reports be produced for inspection by the court, and that such portions as contradicted the witness's testimony be made available to petitioner. The trial court, however, was not required to grant such a motion in the absence of a showing that the reports sought are contradictory

to the witness's present testimony (or in some other way exculpatory in nature) as to relevant and material matters. Concededly, no such showing was made here. Under the circumstances, petitioner's motion amounted to no more than a "blind fishing expedition" of the type condemned in *Gordon* v. *United States*, 344 U. S. 414, 419.

Although the demand for documents in the *Gordon* case was for direct access, whereas here the request was for submission to the court for its inspection, there is no valid distinction since the danger of a "blind fishing expedition" is still present. The procedure urged by petitioner would merely shift the function of establishing the relevancy of the documents from the defendant to the judge. To require such a procedure, as petitioner asks, not only would unduly burden the trial courts, but also would substantially infringe upon their time-honored discretion in the disposition of such evidentiary matters. The rule urged by petitioner, moreover, disregards the legitimate interest that each party—including the Government—has in safeguarding the privacy of its files, particularly where the documents in question were obtained in confidence. Production of such documents, even to a court, should not be compelled in the absence of a preliminary showing by the party making the request.

We do not suggest that federal courts are without power, in circumstances such as presented in this case, to compel the production of F. B. I. reports. This power has, indeed, been exercised in some instances. But the fact that the trial court here could,

in its discretion, have ordered the production of the reports for its own inspection, and the fact that other courts in comparable cases have done so, do not support a conclusion that the trial court was obliged to do so in this case. It must again be emphasized that the issue is not one of power, but whether the exercise of that power in the special circumstances presented here constituted an abuse of discretion. And discretion, if it is to have any meaning at all, means a discretion to make rulings which, on the basis of the printed record, might even appear to a reviewing court to be mistakes.

2. During the post-trial hearing on petitioner's motion for a new trial, there was testimony by Matusow (who had recanted portions of his trial testimony and was then petitioner's witness) that he had made certain statements to an F. B. I. agent (Crandall) concerning his reluctance to testify at petitioner's trial. Without attempting to show any contradiction between the present testimony and the report, a motion for compulsory production of the report was made and denied. The request amounted to no more than a defense attempt to corroborate Matusow's post-trial testimony and was not within the rationale of the *Gordon* case, *supra,* which dealt with an effort to impeach a prosecution witness. Moreover, the principal basis on which petitioner now claims production should have been ordered was expressly disavowed by petitioner during the hearing. In determining whether there has been an abuse of discretion in denying the motion, the trial court's action must be judged

as of that time—not on the basis of arguments suggested by subsequent study of the record.

The request on redirect examination of Matusow for production of other F. B. I. reports (made to Agent Burttram), on the ground that they would corroborate Matusow's present testimony at the hearing, was also properly denied. Even assuming that production would have been proper to corroborate a recanting witness's post-trial testimony which conflicts with his trial testimony, there was no such conflict shown as to Matusow's testimony on redirect examination. This testimony did not traverse a single statement actually made during the course of the trial. The redirect was carefully confined to statements that Matusow's reports to the F. B. I. did *not* contain certain information—information, moreover, concerning matters as to which he had *not* previously testified at the trial.

B. As the *Gordon* case illustrates, even assuming that the trial court's refusal to compel production of the requested F. B. I. reports constituted an abuse of discretion, there would remain the question whether the error was prejudicial. Just as the particular setting of the trial court's rulings must be examined in determining whether there was an abuse of discretion, so too the broader context of the rulings must be considered in determining whether the asserted error was prejudicial. In this sense, the correctness of the trial court's rulings (which issue petitioner seeks to have reviewed) cannot be extricated and treated separately from the sufficiency of the evidence to support the conviction and the denial of a

new trial (which issue petitioner has abandoned in this Court). Only if "substantial rights" have been infringed would a reversal ever be justified. Rule 52, F. R. Cr. P.

In this respect, comparison with the factual situation in *Gordon* is illuminating. In *Gordon,* the statements sought by the defendants "directly bore on the main issue being tried: the participation of the accused in the crime." 344 U. S. at 418. Here, in contrast, not even petitioner claims that any of the reports would have shown, or ever tended to show, petitioner's innocence of the crime charged. At the very most, they might have helped to impeach the credibility of certain Government testimony. And, even for this purpose, the value of the reports was wholly speculative.

In *Gordon,* moreover, it was pointed out that there "the Government's case may stand or fall on the jury's belief or disbelief of one witness"—the witness whose prior inconsistent statements were sought by the defendants. 344 U. S. at 417. Petitioner seeks to attach similar importance to Matusow's testimony. But the court below expressly held (*a*) that the evidence supported the trial court's finding that Matusow testified truthfully at the trial and that his recantation was false and (*b*) that in any event "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow" and "that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if

Matusow had not been present as a witness (H. 844). Not having sought review of this holding, petitioner is in no position to complain of prejudice in connection with reports sought to impeach Matusow's testimony.

Moreover, the holding in question would appear binding in any event. See *United States* v. *Johnson*, 327 U. S. 106, holding that trial court findings on motions for new trial should not be overturned unless unsupported by *any* evidence. Particularly is this so in the light of the impressive evidence presented by the Government at the post-trial hearing as to the circumstances of Matusow's recantation.

## II

A. Petitioner complains of the trial court's charge to the jury as to the nature of membership in the Communist Party.

1. Following the pattern laid down by this Court in *Galvan* v. *Press*, 347 U. S. 522, the trial court charged the jury that, in determining whether petitioner was a member on April 28, 1950, when the affidavit was executed, they could consider (1) attendance at Party meetings, (2) whether he was an officer in the Party, (3) participation in other conduct consistent *only* with Party membership, and (4) all other evidence, either direct or circumstantial, bearing upon whether he was a member on April 28, 1950. Similar criteria are laid down in the Communist Control Act of 1954. In view of the clandestine organizational structure of the Communist Party, it is inconceivable that "member" as used in Section 9 (h) of the Act was intended to mean—as petitioner

urges—only one who has complied with formalized requirements set forth in the Party constitution.

2. Although there was no evidence of the circumstances under which petitioner joined the Communist Party, there is overwhelming evidence that he was a member. Certainly, the act of joining at some time in the past may be inferred from evidence that he was a member later. To be a member at a given time, he must have joined in the past. As the trial judge's instructions made clear, the vital issue under Section 9 (h) revolves around the affiant's status as a *current member* of the Communist Party at the time he executes the affidavit.

3. Contrary to petitioner's assertions, the membership instruction did not authorize the jury to convict petitioner upon the basis of pre-affidavit evidence alone, or upon any part of that evidence. Petitioner confuses (a) the evidence the jury was told it might consider (along with other evidence) and (b) the evidence it should base its finding upon. Furthermore, other instructions expressly admonished that the verdict must be based upon *all* the evidence, and that in determining the issues in this case it must consider *all* the evidence and the testimony of *all* the witnesses.

4. Equally without merit is petitioner's argument that the membership instruction authorized the jury to apply a "presumption of continuance" of membership. No such presumption was even mentioned in the charge. In addition, the Government's evidence, which related to the post-affidavit period as well as the pre-affidavit period and which has not been challenged

by petitioner as to sufficiency, showed a definite pattern of conduct leading to a reasonable inference that petitioner was, beyond a reasonable doubt, a member of the Communist Party on April 28, 1950.

5. The jurors were properly charged that the burden was on the Government to prove beyond a reasonable doubt that "the defendant made the statement * * * *willfully, knowing it to be false.*" [Emphasis added.] In any event, petitioner's contention that the jury was not required to confine its judgment to the accused's conception of membership—not having been raised at the trial, in the court below, or in the petition for certiorari—is not properly before the Court.

B. Petitioner also complains of the trial court's charge to the jury as to the nature of affiliation with the Communist Party. However, it should be noted that, since the convictions as to Count One (false swearing as to membership) and Count Two (false swearing as to affiliation) resulted in like sentences to run concurrently, affirmance on either count would require that the judgment of the court below be affirmed. *E. g., United States* v. *Sheridan,* 329 U. S. 379.

1. The contentions that the instruction as to affiliation allowed the jury to convict on the basis of pre-affidavit evidence alone, and that the jury was not required to confine its judgment to the accused's conception of affiliation, parallel similar contentions with respect to the charge as to membership. Accordingly, the contentions must be rejected for the same reasons (see *supra,* pp. 21, 22).

2. *Bridges* v. *Wixon,* 326 U. S. 135, is clearly inapplicable to the present case. The statute there was

expressly operative only in event of proof of affiliation with an organization advocating *unlawful activities.* In the instant case, by contrast, it is affiliation on the part of the union officer with the Communist Party, as such, to which the statute has reference, regardless of the ultimate purpose of the organization, and regardless of whether the affiliated union leader agrees with the Party's revolutionary objective. Conviction was not for affiliating with the Party, but for falsely swearing that there was no affiliation.

3. Since language must necessarily be understood in context, and since the court immediately qualified the dictionary definition by stating that affiliation as used in Section 9 (h) "means something less than membership but more than sympathy" (R. 417), the instruction was sufficiently clear to enable the jury to separate the issues under the membership and affiliation counts.

## III

The jurors were properly charged that, in determining the weight to be accorded the testimony of Government informants, they should consider the fact that these informants had received money for services and expenses while furnishing information to the F. B. I. There being no invariable verbal formula for such an instruction, it is only required that the instruction be accurate and give the jury what it fairly needs to reach a verdict. Thereafter, the credibility of the witnesses is peculiarly within the competence of the jury.

ARGUMENT

In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court sustained the constitutionality of Section 9 (h) of the Labor-Management Relations Act of 1947, 29 U. S. C. 159 (h). See also *Osman* v. *Douds*, 339 U. S. 846. The Court held that the non-Communist affidavit provision of that section was a valid exercise of Congressional power to protect commerce from the evils of disruptive, politically inspired strikes. Cf. *Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), certiorari denied, 349 U. S. 953.

This case, like *Hupman*, involves a conviction of making false statements in a non-Communist affidavit filed pursuant to Section 9 (h). Petitioner (except in passing [9]) does not challenge the constitutionality of Section 9 (h), but confines his attack to the refusal of the trial court to compel the production of certain F. B. I. reports and to the adequacy of the charge.[10] Petitioner also does not challenge the sufficiency of the evidence to support his conviction; nor does he challenge the sufficiency of the evidence to support the denial of his motion for a new trial.

## I

### THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING, IN ITS DISCRETION, TO COMPEL PRODUCTION OF THE F. B. I. REPORTS SOUGHT BY PETITIONER

Petitioner contends (Br. 25–43) that the court below erred in affirming the trial court's denial of cer-

[9] See note 42, *infra*.

[10] In his petition for certiorari, petitioner also attacked the admissibility into evidence of a prior affidavit and the validity of the exclusion of women from the jury. These questions, however, were deleted from the grant of certiorari. 350 U. S. 980.

tain motions of petitioner to produce various documents from the files of the Federal Bureau of Investigation (F. B. I.).

It is, of course, well settled that a "large discretion must be allowed the trial judge" with respect to the production of documents, and that in the absence of abuse the exercise of that discretion will not be upset. *Goldman* v. *United States,* 316 U. S. 129, 132; *D'Aquino* v. *United States,* 192 F. 2d 338, 375 (C. A. 9), certiorari denied, 343 U. S. 935; *Little* v. *United States,* 93 F. 2d 401, 407 (C. A. 8), certiorari denied, 303 U. S. 644; *Arnstein* v. *United States,* 296 Fed. 946, 950 (C. A. D. C.), certiorari denied, 264 U. S. 595. Cf. *Glasser* v. *United States,* 315 U. S. 60; *Alford* v. *United States,* 282 U. S. 687. This is so even where the documents sought have been used at the trial for the purpose of refreshing a witness's recollection. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233, 234. And, where the documents have not been used for that purpose (as in the instant case), the trial court's discretion is even greater. *Goldman* v. *United States, supra.* Since the appropriate action on a motion to produce made in connection with the examination of a witness depends on the significance of the fact offered for proof, which in turn depends on "numerous and subtle considerations difficult to detect or appraise from a cold record * * *," the trial court's discretion should be upheld absent "a clear showing of prejudicial abuse of discretion." Cf. *Michelson* v. *United States,* 335 U. S. 469, 480.

Petitioner on four occasions, twice during the trial and twice in the course of the hearing on petitioner's

motion for a new trial, moved for the production of certain F. B. I. reports by or concerning two Government witnesses, Matusow (*supra,* pp. 10–12) and Ford (*supra,* pp. 8–10). Each of the four requests sought production of a separate category of reports, and each category in turn related to a specific conversation or period of time. In all four instances, the requests were denied. When these rulings of the trial court are examined in the setting in which they were made, their correctness becomes apparent, it is clear there was no abuse of discretion. Moreover, assuming *arguendo* that any of these rulings were erroneous, the error was not sufficiently prejudicial to warrant reversal.

A. NO PROPER FOUNDATION FOR THE COMPULSORY PRODUCTION OF THE REPORTS WAS LAID BY PETITIONER

1. *Requests for production of reports during the trial*

a. *Request for Matusow's reports relating to conversations in July, 1950.*

Petitioner opened his cross-examination of Matusow at the trial by developing the fact that Matusow had reported orally and in writing to the F. B. I. with respect to the conversations he had had with petitioner in July, 1950 (R. 293–295). Thereupon, without any attempt to develop a foundation for his request, petitioner asked that all such reports be produced for inspection by the court, and that such portions as contradicted the witness's testimony be made available to petitioner (R. 295–296). Petitioner placed principal reliance on the decision in *United States* v. *Krulewitch,* 145 F. 2d 76 (C. A. 2), reversed on other grounds, 336 U. S. 440. After argument on the motion (R. 295–303), during which Government

counsel pointed out that, so far as appeared, "this witness has not varied one particle from any of those statements he has made and the statements he is making on the witness stand now" (R. 300), the court denied the motion (R. 302).

This ruling, we submit, was not an abuse of discretion. Under the circumstances, petitioner's motion contemplated a "blind fishing expedition" of the sort this Court condemned in *Gordon* v. *United States*, 344 U. S. 414, 419. In the *Gordon* case, the one witness upon whom "the Government's case [might] stand or fall" (344 U. S. at 417) admitted on cross-examination that, prior to his final statement to the Government implicating the defendants, he had made three or four statements which did not implicate them.[11] The inconsistency between the earlier statements and the testimony was thus conceded. In holding that the defendants' motion to compel production of these earlier statements should have been granted, the Court emphasized the foundation laid for the motion (344 U. S. at 418–419):

[11] Petitioner seeks to analogize the instant case to *Gordon* by alleging that the Government's case for proving petitioner's connection with the Communist Party as of April 28, 1950, was dependent upon the credibility of Matusow, who was the "only" witness to testify for the period following that date (Br. 26). This, however, is not true. Petitioner overlooks the testimony of Ford, who remained a member of the Communist Party until September, 1950 (*supra*, p. 10), and who acted as security officer of the Party in addition to being, together with petitioner, a member of the State Board of the Communist Party of New Mexico (R. 106–107, 115; *supra*, p. 10). Ford testified that up to September, 1950, he knew of no disciplinary action of any kind taken against petitioner by the State Board (R. 119), and that petitioner was not replaced as a member of the State Board up to that date

> By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, *were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried:* the participation of the accused in the crime. [Emphasis added.]

The Court concluded "that *upon the foundation that was laid* the [trial] court should have * * * ordered production of the documents" (emphasis added) (344 U. S. at 419).[12] The Court thus recognized the well-established rule that a trial judge is not required to grant such a motion in the absence of a showing that the reports sought are contradictory to the witness's

---

(R. 133). Petitioner also ignores the testimony of Jesus Terrazas that at union meetings in the pre-affidavit period petitioner stated that he did not want the members to require the leaders to sign non-Communist affidavits (R. 237–238); that petitioner made a speech in July, 1950, concerning a nation-wide strike (R. 348–349, 355) to be called in conjunction with the Mexican Miners Union (R. 355); and that petitioner, throughout 1950, 1951, and 1952, urged members of his union to read the *Daily People's World* and *National Guardian*, which "bring out the truth to the people" (R. 348). As correctly pointed out by the court below, "The Government's total proof that appellant was so connected with the Communist Party before and after that date [April 28, 1950] was overwhelming" (R. 510), and "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow" (H. 844).

[12] It is by no means clear, it should be added, that the Court in *Gordon* would have reversed on this ground alone. The Court further held that the trial court erred in excluding from evidence a transcript of proceedings based on the same events in

present testimony (or in some other way exculpatory in nature) "as to relevant, important and material matters." The *Krulewitch* decision, so heavily relied upon by petitioner (Br. 27, 28, 30), is itself authority for this rule.[13]

An examination of the record in this case fails to disclose that any such showing was made. As a matter of fact, no attempt whatever was made to demonstrate that the prior statements of the witness were contradictory of his present testimony. And petitioner so concedes (Br. 29). Cf. *Shelton* v. *United States*, 205 F. 2d 806, 814–815 (C. A. 5), petition for writ of certiorari dismissed by petitioner, 346 U. S.

---

another court against the witness. 344 U. S. at 417, 421–422. That this Court might well have affirmed the conviction, had the record revealed only the error discussed in the text, is suggested by its statement in conclusion that "[w]e believe * * * that the *combination* of these *two* errors was sufficiently prejudicial to require reversal" (*id.* at 422, emphasis added).

[13] In *Krulewitch*, as in *Gordon*, the statement in question "completely exculpated the accused" and was flatly inconsistent with the testimony of the Government witness. Emphasizing these facts, Judge Learned Hand expressly distinguished the situation where no such foundation had been laid. 145 F. 2d at 78–79. See also *United States* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2), certiorari denied, 323 U. S. 799. This distinction was re-emphasized by the Second Circuit in *United States* v. *Ebeling*, 146 F. 2d 254, 257 (C. A. 2), and *United States* v. *De-Normand*, 149 F. 2d 622, 625–626 (C. A. 2), certiorari denied, 326 U. S. 756. While it is true that in some of these cases the trial judge had examined the requested documents, none of the decisions even deals with the question of when such examination must be ordered. And, as pointed out *infra* (pp. 31–32), the fact that there has been such examination in other cases lends no support to petitioner's conclusion that his conviction should be reversed because of the failure of the trial judge in this case to order such examination. The issue here, it must be stressed,

892; *Scanlon* v. *United States*, 223 F. 2d 382, 385–386 (C. A. 1); *United States* v. *Remington*, 191 F. 2d 246, 251 (C. A. 2), certiorari denied, 343 U. S. 907. Indeed, Matusow was not even asked whether his reports contradicted his trial testimony.

Petitioner contends, however, that the court below misapplied the holding of the *Gordon* case since the demand there was for direct access to the documents, whereas here the request was for the documents to be submitted to the court for its inspection (Br. 29). This attempted distinction is without merit. Regardless of whether the documents would be turned over to the defendant or to the court, the danger of a "blind fishing expedition" (*Gordon* v. *United States*, 344 U. S. at 419) is still present.[14] Under the procedure pro-

---

is not whether trial judges have this power, but whether, in the particular circumstances presented, the trial judge in this case abused his discretion in exercising that power.

See also *Arnstein* v. *United States*, 296 Fed. 946, 950 (C. A. D. C.), certiorari denied, 264 U. S. 595; *D'Aquino* v. *United States*, 192 F. 2d 338, 375 (C. A. 9), certiorari denied, 343 U. S. 935; *Christoffel* v. *United States*, 200 F. 2d 734, 737–739 (C. A. D. C.), reversed on other grounds, 345 U. S. 947; *Little* v. *United States*, 93 F. 2d 401, 407 (C. A. 8), certiorari denied, 303 U. S. 644; *United States* v. *Lightfoot*, 228 F. 2d 861, 868 (C. A. 7), pending on writ of certiorari, No. 32.

The Ninth Circuit decision in *Fisher* v. *United States*, 231 F. 2d 99, on which petitioner (Br. 27–28) also relies, is not to the contrary. It merely represents a particular application of the general rule recognized in the *Gordon* case, and is not authority for the proposition that the trial court in this case abused its discretion in the different circumstances involved here.

[14] That a "blind fishing expedition" was precisely what petitioner had in mind is clear from his statement in the argument on the motion (R. 298):

"Now, Your Honor, if we had the documents we would be in a position to ask the witness whether he hadn't said something in

posed by petitioner, the function of establishing the relevancy of the documents would merely be shifted from the defendant to the judge. To require such a procedure, without any preliminary showing or foundation, would not only unduly burden the trial courts but would substantially infringe upon their time-honored discretion in the disposition of such evidentiary matters. See *Scanlon* v. *United States,* 223 F. 2d 382, 385–386 (C. A. 1). The rule urged by petitioner, moreover, disregards the legitimate interest that each party—including the Government—has in safeguarding the privacy of its files, particularly where the documents in question were obtained in confidence. Production of such documents, even to a court, should not be compelled in the absence of a preliminary showing by the party making the request. Cf. *Hickman* v. *Taylor,* 329 U. S. 495, 512; *Bowman Dairy* v. *United States,* 341 U. S. 214, 220, 221; Rules 16 and 17 (c), F. R. Cr. P.

We do not, of course, suggest that federal courts are without power, in circumstances such as presented in this case, to compel the production of F. B. I. reports for these purposes. This power has, indeed, been exercised in some instances.[15] But the fact that the trial court here could, in its discretion, have ordered the

---

that report which was contradictory of what he said here * * *. [*I*]*f there is something contradictory in those reports*, then we are entitled to use it as a part of the search for the truth, and in order to avoid the situation where we would be rummaging through Government files." [Emphasis added.]

[15] In particular, petitioner relies on *United States* v. *Flynn*, 130 F. Supp. 412 (S. D. N. Y.), where Judge Dimock inspected certain F. B. I. documents reporting statements made by Matusow. This was, of course, within that court's discretion in the circumstances

production of the reports for its own inspection, and the fact that other courts in comparable cases have done so, certainly do not support a conclusion that the trial court was obliged to do so in this case. It must again be emphasized that the issue is not one of power, but whether the exercise of that power in the special circumstances presented here constituted an abuse of discretion. And discretion, if it is to have any meaning at all, means a discretion to make rulings which, on the basis of the printed record, might even appear to a reviewing court to be mistakes.

b. *Request for Ford's reports.*

Government witness Ford had preceded Matusow to the witness stand. During cross-examination, Ford testified that he had reported in writing or orally to the F. B. I. on every meeting attended by him (R. 170). Subsequently, following the completion of Matusow's examination and the demand for production of the latter's reports, *supra,* petitioner made the same motion for compulsory production of the reports made by Ford. This motion likewise was denied (R. 321–322).

---

of that particular case, and does not show that the trial judge here abused his discretion in the different circumstances of this case. Petitioner also ignores the fact that Judge Dimock, solely on the basis of the trial transcript, determined that, as to all but two of the defendants in that case, the jury could not have reasonably reached a different result even without Matusow's testimony and accordingly denied those defendants a new trial. The court below, in affirming the denial of petitioner's motion for a new trial, made precisely such a determination in this case (H. 844).

Petitioner's motion was based on the same ground as the request for the Matusow reports. Not only was there a complete failure to lay a foundation, but petitioner's counsel did not even ask the witness whether or not his reports contained anything contradictory to his present testimony. The request appears to have been nothing more than an afterthought following the prior motion, and was a mere "fishing expedition" in the truest sense. Being similar in all respects to the prior request for production of the Matusow reports, this request stood on no better ground and is governed by the same principles (*supra*, pp. 26–32), which in the interest of brevity need not be repeated.

2. *Requests for production of reports during the hearing*

a. *Request for Agent Crandall's report.*

At the hearing on the motion for a new trial, Matusow under cross-examination by the Government testified concerning a conversation with an FBI agent, Clarence Crandall, in the latter part of August 1953, prior to the trial of the case. According to Matusow's testimony (H. 68):

> I told the F. B. I. agent I didn't want to testify in the Jencks trial. I didn't feel my testimony was honest. Or, in substance, that is what I told him—I didn't want to ever testify and especially in the Jencks trial that was coming up.

Petitioner subsequently moved for an order requiring the Government to produce the reports of the F. B. I. relating to this conversation (H. 107, 147), again urging (H. 147) in support of the demand *United*

*States* v. *Krulewitch, supra,* 145 F. 2d 76 (C. A. 2), reversed on other grounds, 336 U. S. 440. The motion was denied (H. 107, 147).

As previously noted (*supra,* pp. 28–32), the production of statements made by witnesses to an investigating agency is not mandatory absent the establishment of a proper foundation, and the *Krulewitch* decision is itself authority for this requirement.[16] Here, too, as in the case of the reports sought at the trial, the requisite showing was not made. No contradiction whatever between the witness's testimony and the report was established or even implied. Moreover, Matusow was at this point a defense witness and counsel was simply seeking to bolster the testimony then being given.[17] Petitoner's request therefore amounted to no more than an attempt at board discovery on a collateral issue, in support of the defendant's own witness, and plainly did not fall within the rationale of *Gordon* v. *United States, supra.* See *Shelton* v. *United States,* 205 F. 2d 806, 814–815 (C. A. 5).

Moreover, the argument now made by petitioner in support of the compulsory production of the F. B. I. report is quite different from the reason advanced in the trial court. Now petitioner places primary emphasis on the remark, "I didn't feel my testimony was honest," in the above-quoted statement. But at the hearing no mention was made of this remark as a basis for requiring production of the report (H. 107, 147). In fact, when Crandall (who was later put

[16] See note 13, *supra.*

[17] In this connection, see opinion of the court below at H. 846.

on the stand by the Government) was asked by the Government counsel: "Did [Matusow] say to you he had been a dishonest witness * * *?", petitioner's counsel immediately objected on the ground that "Matusow did not testify that he had made any such statement to the F. B. I. man in Santa Fe" (H. 755–756).[18] And, after Crandall had denied that Matusow had made such a statement,[19] defense counsel made no effort to cross-examine Crandall as to the matter. In determining whether the trial court abused its discretion in refusing to compel production of the report, the trial court's action must be judged as of that time—not on the basis of arguments suggested by a subsequent study of the record. Particularly is this so in view of the express denial by defense counsel

[18] This interpretation by petitioner's counsel of the above-quoted statement of Matusow's testimony has a substantial basis in fact. The statement is certainly not unambiguous. It is entirely possible that the remark, "I didn't feel my testimony was honest" was intended merely to reflect Matusow's subjective motive for telling Crandall of his reluctance to testify, not something he actually told Crandall. This interpretation of the statement is supported by Crandall's testimony that Matusow never made the remark to him.

[19] Crandall testified that Matusow visited him twice and telephoned him twice while he, Matusow, was in Santa Fe, New Mexico, in 1953 (H. 753–755). In no instance did Matusow ever hint that his testimony was not honest (H. 754). During their first conversation, Matusow stated that he was attempting a reconciliation with his estranged wife and was fearful that the resulting publicity from his further testimony might interfere with the attempted reconcilation (H. 754). Subsequent to this first conversation, however, Matusow called Crandall to inform him of his whereabouts "in the event he was needed in court" (H. 755). He also furnished Crandall with his address in Washington, D. C., so that he could be reached, if needed, for further testimony (H. 755).

at the hearing that Matusow made the statement now relied upon.

b. *Request for Matusow's reports to Agent Burttram*

The final request by petitioner for production of F. B. I. reports occurred on the last day of oral testimony submitted during the hearing on the motion for new trial. Matusow, under redirect examination, stated that, although he was a member of the Communist Party, he was not a member in the State of New Mexico, and that he had not attended any Communist functions there (H. 660). He alleged that the reports made to Agent Burttram of the F. B. I. in August, 1950, would bear out these statements (H. 661). He also asserted that in those reports he did not state that petitioner was a Communist or that petitioner had identified himself as a Communist (H. 661–662). Petitioner thereupon requested production of all F. B. I. reports dealing with reports Matusow had given to Agent Burttram on the ground that they would corroborate Matusow's present testimony (H. 663–664). The motion was denied (H. 664).

The court's ruling was correct. Even assuming *arguendo* that production of the documents could be compelled to corroborate a recanting witness's testimony which is in conflict with the witness's trial testimony as to these matters. Notwithstanding the careful language employed by Matusow to create the illusion of a contradiction, his testimony at the hearing as to these matters did not traverse a single statement he had made in the

trial. The record shows that Matusow's testimony at the trial, as a Government witness, concerned only certain conversations he had had with petitioner in 1950 (see Statement, *supra*, pp. 10–12). At no time during the trial did Matusow testify that he was himself a member of the Communist Party of the State of New Mexico; nor did he state that petitioner was a member of the Communist Party,[20] or that petitioner had said that he was a member of the Communist Party. Moreover, in testifying at the hearing some fourteen months later, Matusow avoided stating that his reports to the F. B. I. were related to the evidence he had furnished at the trial. His testimony was carefully confined to statements that the reports he had made to the agent did *not* contain certain information and, as already pointed out, the information which Matusow stated was *not* contained in the reports concerned matters as to which he did *not* previously testify. Thus petitioner, having failed to develop any inconsistency whatever between Matusow's testimony at the hearing and at the trial, or any relevant evidence going to the issue of his innocence, was not entitled as a matter of right either to direct access to the documents or to inspection by the court. See *Gordon*

[20] The recantation alleged that "[t]here was no basis for my stating that [petitioner] was a member of the Communist Party *at the time I stated so* in Court" (emphasis added) (H. 10). Besides the fact that Matusow did not make such a statement at the trial, the recantation involves a latent ambiguity, since it could be construed to mean that Matusow had no basis for stating that petitioner was, at the time of the trial (*i. e.*, in January, 1954), a member of the Communist Party. The central issue, of course, is whether petitioner was a member in April, 1950.

v. *United States, supra.* Compare *Boehm* v. *United States,* 123 F. 2d 791, 806 (C. A. 8), certiorari denied, 315 U. S. 800.

Nor can petitioner justify the compulsory production of the reports on the ground that they would help rehabilitate a witness whose credibility was impeached on cross-examination.[21] See *Ellicott* v. *Pearl,* 10 Pet. 412, 438–439; *Goins* v. *United States,* 99 F. 2d 147, 150 (C. A. 4), writ of certiorari dismissed, 306 U. S. 622; *Beaty* v. *United States,* 203 F. 2d 652, 656 (C. A. 4), remanded to C. A., 348 U. S. 905; *Goldberg* v. *United States,* 213 F. 2d 734, 736 (C. A. 4); *DiCarlo* v. *United States,* 6 F. 2d 364, 366 (C. A. 2), certiorari denied, 268 U. S. 706. Matusow's assertions, as to which corroboration was sought, were not elicited in response to issues raised on cross-examination by the Government, nor do they contradict or even involve matters to be found in the trial record concerning which he had been cross-examined. Here the reports were demanded merely to corroborate certain *irrelevant* statements of Matusow, petitioner's own witness, on redirect examination.[22] Cf. *Bates* v. *Preble,* 151 U. S. 149, 157; *Vicksburg & Meridian Rail-*

[21] Petitioner argues that the documents were admissible to rehabilitate Matusow as the foundation showed them to be consistent with his direct testimony and given prior to the facts showing fabrication or motive to do so (Br. 39, 41–42).

[22] For the same reason, the "best evidence" rule as urged by petitioner (Br. 27, 35–36) has no application here. See *Gordon* v. *United States,* 344 U. S. 414, 421. ("Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters.") At no time during these proceedings, morever, did the Government attempt to prove the content of these

*road* v. *O'Brien*, 119 U. S. 99, 102; *Stockyards Loan Co.* v. *Nichols*, 260 Fed. 393, 395 (C. A. 8), certiorari denied, 245 U. S. 668; *Gunning* v. *Cooley*, 30 F. 2d 467, 469 (C. A. D. C.), affirmed, 281 U. S. 90.

B. IN ANY EVENT, THE TRIAL COURT'S REFUSAL TO COMPEL PRODUCTION OF THE REPORTS WAS NOT PREJUDICIAL

As the *Gordon* case illustrates,[23] even assuming that the trial court's refusal to compel production of the requested F. B. I. reports constituted an abuse of discretion, there would remain the question whether the error was prejudicial. Rule 52, F. R. Cr. P.; see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233, 234. Just as the particular setting of the trial court's rulings must be examined in determining whether there was an abuse of discretion (*supra*, pp. 26–38), so too the broader context of the rulings must be considered in determining whether the asserted error was prejudicial. In this sense the correctness of the trial court's rulings (which issue petitioner seeks to have reviewed) cannot be extricated and treated separately from the sufficiency of the evidence to support the conviction and the denial of a new trial (which issue petitioner has abandoned in this Court). Only if "substantial rights" have been infringed would a reversal ever be justified. Rule 52, F. R. Cr. P.

---

reports. And, in any event, where the witness' present recollections are unimpaired as to the facts testified to, introduction of the reports in evidence is not required. Cf. *Bates* v. *Preble*, 151 U. S. 149, 157; *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, 102; III Wigmore, *Evidence* (3d ed.) § 738, p. 76.

[23] See note 12, *supra*.

In this respect, comparison with the factual situation in *Gordon* is illuminating. In *Gordon,* the statements sought by the defendants "directly bore on the main issue being tried: the participation of the accused in the crime." 344 U. S. at 418. Here, in contrast, not even petitioner claims that any of the reports would have shown, or ever tended to show, petitioner's innocence of the crime charged. At the very most, they might have helped to impeach the credibility of certain Government testimony. Even for this purpose, the value of the reports was wholly speculative. As already noted, the reports requested at trial (*supra,* pp. 26–27, 32–33) were not shown to be inconsistent with any testimony on any issue—let alone "on the main issue being tried." And the reports requested at the post-trial hearing (*supra,* pp. 33–34, 36) were sought only for the purpose of corroborating certain statements *not in conflict* with any of the trial testimony.

In *Gordon,* moreover, it was pointed out that there "the Government's case may stand or fall on the jury's belief or disbelief of one witness"—the witness whose prior inconsistent statements were requested by the defendants. 344 U. S. at 417. Petitioner seeks to attach similar importance to Matusow's testimony (Br. 26, 38). But the court below expressly held (*a*) that the evidence supported the trial court's finding that Matusow testified truthfully at the trial and that his recantation was false[24] (H. 842), and (*b*) that in

[24] A signal characteristic of such a case as the present is that the testimony of a recanting witness in support of an application for a new trial has universally and consistently been regarded

any event "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow" and "that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness". (H. 844). Not having sought review of this holding, petitioner is in no position to complain of prejudice in connection with reports sought to impeach Matusow's testimony.

Moreover, the holding in question, under settled law, would appear binding in any event. See *United States* v. *Johnson*, 327 U. S. 106, 111; *Larrison* v. *United States*, 24 F. 2d 82, 88 (C. A. 7); *Martin* v. *United States*, 17 F. 2d 973, 976 (C. A. 5), certiorari denied, 275 U. S. 527. In *United States* v. *Johnson, supra*, also involving a motion for a new trial on the ground of newly discovered evidence, Johnson, in support of his claim, submitted to the court numerous affidavits alleging that the prosecuting witness committed perjury on the stand. After careful scrutiny of these and the many counter-affidavits against the motion, the trial court found, as in the instant case, that there was nothing to show the commission of perjury and that the witness told the truth at the trial. The Court of Appeals reversed, granting a new trial. Upon certiorari, this Court, reversing the Court of Appeals,

---

with the utmost suspicion. *United States* v. *Troche*, 213 F. 2d 401 at 403 (C. A. 2); *Martin* v. *United States*, 17 F. 2d 973, 976 (C. A. 5); *Harrison* v. *United States*, 7 F. 2d 259, 262 (C. A. 2); *People* v. *Shilitano*, 218 N. Y. 161, 170; *Larrison* v. *United States*, 24 F. 2d 82, 87–88 (C. A. 7).

held that it is not within the province of appellate tribunals to review orders issued pertaining to motions for a new trial, when the review is sought to correct "erroneous findings of fact." The Court stated (327 U. S. at 111–112):

> While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Glasser* v. *United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

See also *Weiss* v. *United States*, 122 F. 2d 675, 692 (C. A. 5), certiorari denied, 314 U. S. 687; *United States* v. *Troche*, 213 F. 2d 401 (C. A. 2).

Here, not only did petitioner offer no support for his motion for a new trial other than the "recantation" by Matusow,[23] but the Government, on the other hand,

[23] Petitioner contends that the court, by not ordering the production of documents, prevented itself from drawing an inference against the Government for "failure to produce stronger evidence within its power to present" (Br. 36). This, however, is a matter of discretion for the court to be determined by the relevant circumstances surrounding the case. On the other hand, it is particularly significant that petitioner, allegedly aware of the falsity of Matusow's trial testimony, failed to call as witnesses those persons named by Matusow as being present during the conversations and lecture with petitioner, and as to whom there were no recantations (*i. e.*, Abraham Marcus (R. 244), Craig Vincent (R. 245), Joseph DiSanti (R. 245)), in order to refute *directly* this alleged false testimony, without obliging petitioner himself to take the witness stand. No inference that the testimony of an uncalled witness would be unfavorable can, of course, be raised against one party when the witness is accessible to either party. Cf. *United States* v. *Beekman*, 155 F. 2d 580, 584 (C. A. 2); *Erie R. Co.* v. *Kane*, 118 Fed. 223, 239 (C. A. 6), certiorari denied,

produced ten witnesses and eighteen exhibits in rebuttal to establish the unreliability of the recantation. That there was no error by the trial court in denying a new trial is made manifest by an examination of the summary of this evidence in the Appendix, *infra*, pp. 64–71, particularly that portion relating to the events leading up to the recantation. See also the opinion of the court below at H. 837–843. The trial judge, having had the advantage of hearing the testimony and observing the demeanor of the witness at the original trial, was well qualified to pass on the question of truth or falsity of the recantation.[26] Cf. *United States* v. *Johnson*, 327 U. S. at 112; *Harrison* v. *United States*, 191 F. 2d 874, 876.

In addition, the court had before it, among other pertinent evidence,[27] the uncontradicted documentary

---

207 U. S. 593; II Wigmore (3d ed.) § 288. But when there is a likelihood of bias on the part of the uncalled person in favor of the one party, that person is not in the true sense "equally available" to both; and, except in unusual circumstances, a party's employee or fellow union officers and friends come within that category. Cf. *United States* v. *Beekman*, *supra*; *Scanlon* v. *United States*, 223 F. 2d 382, 391–392 (C. A. 1); 5 A. L. R. 2d 912. Hence, the production of weak or no evidence at all when strong is available to refute a substantial portion of the witness's damaging testimony "can lead only to the conclusion that the strong would have been adverse * * *. Silence then becomes evidence of the most convincing character." *Interstate Circuit* v. *United States*, 306 U. S. 208, 226.

[26] The fact that Judge Dimock in *United States* v. *Flynn*, 130 F. Supp. 412 (S. D. N. Y), accepted Matusow's recantation in that case certainly does not require the conclusion that his recantation here, of an entirely different nature in an entirely different case, must also be accepted. See note 15, *supra*.

[27] Thus, for example, there was uncontradicted testimony during the hearing (H. 530, 534–535, 540) that petitioner had ad-

evidence that Matusow, just one month prior to filing his affidavit of recantation and during the last tape-recording session with his publisher, stated: *"I knew Jencks was a Party member and I said so.* I can't say here that Jencks wasn't a Party member after he signed the affidavits because *I know that he was"* [emphasis added] (H. 693–694; Appendix, *infra,* p. 69). Moreover, the trial judge had, at his ready disposal, the record of the trial testimony and was aware that those matters which Matusow asserted would be contradicted by the F. B. I. reports were matters as to which he had not testified at the trial. Having all those facts before him, the trial judge did not commit a prejudicial abuse of his discretion in denying petitioner's motions for a new trial and for compulsory production of the reports requested at the hearing.

## II

### THE TRIAL COURT PROPERLY CHARGED THE JURY ON THE ISSUES OF MEMBERSHIP AND AFFILIATION

#### A. INSTRUCTION ON MEMBERSHIP

The jury was charged, *inter alia,* that (R. 415–416):

> In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with member-

---

mitted the truth of a particularly significant aspect of Matusow's trial testimony which he had recanted. See Appendix, *infra,* p. 65, n. 1.

> ship in the Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the Communist Party on April 28, 1950.

Petitioner contends (Br. 44–69) that the instruction failed to give proper guidance to the jury as to the issue of membership. This contention, we submit, was properly rejected by the court below as "wholly unconvincing" (R. 515).[28]

1. It is urged (Br. 44–45) that "The court ignored the legal principles usually operative in defining and evaluating the membership relation," *i. e.*, the principles "that membership in a voluntary association is consensual and that the act of joining and of acceptance as such is manifested by compliance with the formalized requirements of membership laid down by the organization itself [in its constitution]". Nothing in the pertinent statutes or this Court's decisions—especially *Galvan* v. *Press*, 347 U. S. 522—justifies an instruction based on such principles.

When Congress enacted the Labor Management Relations Act of 1947, it did not undertake to define the term "member." Nor did Congress do so in enacting similar provisions in the Internal Security Act of 1950.[29] *Galvan v. Press*, 347 U. S. 522, 526. The

[28] As the court below pointed out (R. 515), the charge in this case followed closely the charge given by the trial court and sustained on appeal in *Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), certiorari denied, 349 U. S. 953.

[29] 64 Stat. 987, 1006, § 22, 50 U. S. C. §§ 781 *ff.*, as amended, the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, 204, § 241 (a).

sponsor of the Act, Senator McCarran, repeatedly stated that the term "was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918." [30] *Id.* at 527. And, in the Communist Control Act of 1954,[31] Congress—in language closely parallel to the membership instruction challenged here—merely itemized several types of evidence which a jury may consider for the purpose of determining membership in the Party, culminating with the proviso that the enumeration of the "above subjects of evidence" shall not limit the inquiry into and consideration of "any other subject of evidence" on membership, etc.

Moreover, in view of the abundant evidence adduced before Congress regarding the clandestine organizational structure of the Party [32] and the necessity for "secret" or "underground" members to effectuate its policies (see *Dennis* v. *United States*, 341 U. S. 494, 498; *Frankfeld* v. *United States*, 198 F. 2d 679, 684–685 (C. A. 4), certiorari denied, 344 U. S. 922), it is inconceivable that Congress could have intended

---

[30] To illustrate what "member" did not cover, Senator McCarran quoted language from *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. Mass.), stating that

"Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge." See *Galvan* v. *Press*, 347 U. S. at 527.

[31] See § 5, 68 Stat. 777 (50 U. S. C. [Supp. III] 844).

[32] See the Government briefs in this Court in *Communist Party* v. *Subversive Activities Control Board*, 1955 Term, No. 48, pp. 43–69; *Dennis* v. *United States*, 1950 Term, No. 336, pp. 40–47; and *Yates* v. *United States*, Nos. 6, 7, 8, this term, at pp. 170–174.

"member," as used in Section 9 (h) of the Labor Act, to mean only one who has complied with technical requirements set forth in a self-serving document prepared by the Party and called its constitution. As a matter of fact, the very nature of the Party militates against the use of its constitution to determine its true membership. The Communist Party, to assure maximum efficiency in carrying out its aims, admonished members to conceal their membership (R. 110) and did not issue membership cards (R. 132), provided a "membership at large" for those persons whose open acknowledgment of membership would jeopardize their strategic and important positions in labor unions and other organizations (R. 335–336), refrained from keeping membership rolls (R. 133), and held secret meetings without keeping minutes thereof (R. 336).

In *Galvan* v. *Press, supra,* brought under the deportation section of the Internal Security Act, the question presented to this Court was whether the alien was a "member" of the Communist Party. The alien urged that he had not joined the Party at all, or, if he had joined, he was unaware of the Party's true purposes and program. Holding, however, that the evidence justified the conclusion that he was a "member", the Court pointed out that the alien had been asked to join the Party by one he assumed to be an organizer, that he had attended numerous meetings, that he refrained from applying for citizenship lest the authorities should learn of his membership in the Party, and that he had been active in and an officer of a Communist-front organization. 347 U. S. at 528–529. On these facts, the Court concluded that the record did not show

a relationship to the Party "so nominal as not to make him a 'member' within the terms of the Act." *Id.* at 529.[33] See also Point I of the Government's brief in *Rowoldt* v. *Perfetto,* No. 34, this term.

In the instant case, the proof (see Statement, *supra,* pp. 5–13) established that petitioner held key positions in the Party in New Mexico, repeatedly received instructions from Communist Party leaders, attended closed meetings of the Party, reported on the activities of Communists in veterans' organizations, assisted in plans for the organization of Communist Party groups in union locals, and served on a committee to promote interests of Mexican-Americans with a view to bringing them into the Communist Party. The evidence further established that petitioner received instructions with respect to the payment of dues to the Communist Party, was accepted by other members of the Party as a member, and on an occasion asserted to a non-Communist that he was a member of the Communist Party.

Hence, the trial court here was merely following the pattern enunciated in *Galvan* v. *Press, supra,* when it charged that, in determining whether or not

[33] The crux of this decision was that the Government in a deportation proceeding under the statute needed only to show that the alien was knowingly and willingly a member of an organization known as the Communist Party which operates as a distinct and active political organization (347 U. S. at 528), with present or former membership in the Party, in and of itself, being the ground for deportation. *Id.* at 529. Hence, there is no distinction, in determining whether a person is a "member" of the Communist Party, between membership within the meaning of the deportation laws and membership under Section 9 (h) of the Labor Management Relations Act. Cf. *Hupman* v. *United States,* 219 F. 2d 243 (C. A. 6), certiorari denied, 349 U. S. 953.

petitioner was a "member" of the Communist Party, the jury could consider (1) attendance at Party meetings, (2) whether he was an officer of the Party, (3) participation in other conduct consistent *only* with Party membership, and (4) all other evidence, either direct or circumstantial, which bore or may have borne upon whether he was a member on April 28, 1950 (*supra*, pp. 44–45).[34] These factors, in lieu of a formalistic definition, were properly considered in determining whether the evidence justifies the conclusion that one is a "member" of the Communist Party. *Galvan* v. *Press, supra; Hupman* v. *United States, supra; Fisher* v. *United States*, 231 F. 2d 99, 107 (C. A. 9).[35]

---

[34] Compare the evidentiary factors which the jury in *Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), certiorari denied, 349 U. S. 953 (see record filed with this Court, No. 764, O. T. 1954, p. 615a), was told it might consider in determining whether or not the defendant was a member of the Communist Party: (1) whether or not the accused attended Communist Party meetings; (2) whether or not he paid money to the Communist Party; (3) whether or not he took instructions from Communist Party leaders or officers; (4) whether or not he took part in the dissemination or distribution of Communist literature; (5) whether or not he engaged in other evidence, either direct or circumstantial, which may bear upon the question of whether or not he was a member of the Communist Party.

It is noteworthy that, in charging the jury as to item 5 in the present case, the court limited the jury's consideration to conduct consistent *only* with membership in the Communist Party (see *supra*, pp. 44–45).

[35] Petitioner's reliance (Br. 44, 61) on the *Fisher* decision is misplaced. After charging that "member" when applied to the Communist Party has no unusual or different meaning apart from its normal usage, the trial court there limited the remainder of the instruction solely to a dictionary definition of "member" as "one of the persons composing a society, community, or party; an in-

2. Petitioner also objects (Br. 45, 51, 64) that the instructions do not require that petitioner's "act of joining" the Party be proved.[36] Admittedly there is no evidence in the record of the circumstances under which petitioner joined the Communist Party, yet there is overwhelming evidence that he was a member. Certainly the act of joining at some time in the past may be inferred from the evidence that he was a member later. To be a member at a given time, he must have joined in the past. Section 9 (h) does not require a union officer who executes a non-Communist affidavit, "I have not joined the Communist

---

dividual who belongs to an association." Holding this to be error, the Ninth Circuit reversed and stated that various factors as set down in *Galvan* v. *Press*, *supra*, must be considered to justify the conclusion that a person is a member of the Communist Party, and that the jury should have been reminded of these factors rather than merely synonyms of "member" (231 F. 2d at 107). The court further pointed out that, although neither *Galvan* v. *Press* nor the Communist Control Act, *supra*, deal directly with the question of proper instructions to the jury in a prosecution for filing a false non-Communist affidavit, "they are indications of what the Supreme Court and the Congress believe to be the components of the often used phrase 'member of the Communist Party'" (231 F. 2d at 107, n. 2).

[36] In support of his contention, petitioner quotes (Pet. 26) a statement of this Court that: "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." *American Communications Association* v. *Douds*, 339 U. S. 382, 410–411. The Court was not there addressing itself to the requirements of proof of membership, but was rather contrasting the problem of proving the objective fact of membership with the problem of proving the subjective state of mind of one who falsely swears that he does not believe in the overthrow of the Government by force. In any event, the statement affords no basis for any conclusion that the act of joining cannot be proven by evidence of membership.

Party." It requires him to state, "*I am not a member* of the Communist Party or affiliated with such party" (Govt. Ex. 1, R. 383). The vital issue revolves around the affiant's *status as a current member* of the Communist Party at the time he executes the affidavit. It cannot be argued, for example, that a union officer would become immune to prosecution upon the death of those who could testify to his joining the Party if sufficient evidence were available to establish that he was a member when he filed the affidavit.

3. Petitioner's further objection (Br. 55–60) that the instruction permitted the jury to base its finding of membership on pre-affidavit evidence alone, or upon any part of the pre-affidavit evidence, is without substance.[37] Petitioner confuses (a) what evidence the

[37] In this connection, petitioner argues (Br. 48–50) that the instructions on membership were defective because they called the jury's attention to attendance at meetings and holding office as the criteria of membership; that therefore, since there was no evidence that petitioner attended Communist Party meetings or held a Party office in the post-affidavit period, the jury must necessarily have based its finding of membership on April 28, 1950, solely upon pre-affidavit evidence. This is an obvious effort to "pin down" the Government's case to whatever preconceived "criteria" petitioner thinks advantageous to his side of the case, while blandly disregarding the totality of probative evidence from which the jury could and did conclude beyond a reasonable doubt that petitioner was a member of the Communist Party on April 28, 1950. Moreover, petitioner ignores the testimony of Ford, who remained a member of the State Board of the Communist Party of New Mexico until September, 1950, and was also one of the Party's security officers, that to his knowledge from 1949 to September, 1950, petitioner was never replaced in his position as a member of the State Board (R. 106–107, 108, 115, 133). See also note 11, *supra*.

jury was told it might *consider* along with other evidence and (b) what evidence it should base its finding upon. Petitioner overlooks the trial court's other instructions to the jury (R. 417) that its verdict must be based upon *all* the evidence, and that in determining the issues in this case it must consider *all* the evidence and the testimony of *all* the witnesses.[38] The jurors were also instructed (R. 418) that if they had a reasonable doubt that petitioner was a Party member on April 28, 1950, they would have to acquit him. In addition, they were instructed that a verdict of "not guilty" must be returned if the evidence could be reconciled with any reasonable hypothesis consistent with the innocence of petitioner (R. 410), and that in arriving at a verdict of guilty upon circumstantial evidence the circumstances must be consistent with each other and must be consistent with the idea of guilt and must exclude every other reasonable hypothesis (R. 416). Thus, far from being a license to the jury to base a finding of membership upon a capricious selection of evidence at random from any part of the record, the trial judge's charge threw additional

[38] The necessity for consideration of *all* the evidence was made unmistakably clear to the jury throughout the trial court's instructions, including those on reasonable doubt (R. 409–410), proof of intent and circumstantial evidence (R. 415–416), and burden of proof as to each and every essential element of the crime charged (R. 416–417). Finally, the court charged the jury: "In determining the issues of the case, you will take into consideration all of the evidence adduced at the trial, both positive and circumstantial, bearing upon the respective questions. You should consider the testimony of all the witnesses, the exhibits and the stipulations of counsel and weigh the evidence thus presented carefully, fairly and impartially" (R. 417).

safeguards about petitioner and further assured him of a fair trial.[39]

4. Although no such objection was made in the trial court (see Rule 30, F. R. Cr. P.), it is now urged (Br. 56–60) that the instruction impliedly involved a "presumption of continuance" in contravention to this Court's ruling in *Maggio v. Zeitz*, 333 U. S. 56, 66. See also *Tot* v. *United States*, 319 U. S. 463. In *Maggio*, a "presumption of continued possession" was applied by the trial court, without further inquiry or consideration of other evidence and without regard to the reasonableness of the inference in the light of the particular facts, solely on the basis of the fact that the defendant had possession several years before. In this case, as the court below pointed (R. 511), there was no mention whatsoever of such a presumption in the trial judge's instructions. Moreover, the evidence in this case showed a continuous and definite pattern of conduct by petitioner which could, if accepted by the jury, lead to the conclusion that petitioner was, beyond a reasonable doubt, a member of the Communist Party on April 28, 1950. In short, on the basis of that evidence, the inference that petitioner was a member on that date is a rea-

[39] Moreover, the instructions on circumstantial evidence and reasonable doubt afforded petitioner the maximum protection to which he was entitled upon the theory that he *might* have resigned or ceased to be a member of the Communist Party prior to the date of his affidavit. Of course, since he did not offer any evidence that he had resigned or otherwise severed his connection with the Communist Party, he was not entitled to an instruction on resignation *per se* or any other theory for which there was no support in the evidence.

sonable one.[40] Compare *Tot* v. *United States*, 319 U. S. at 469. Particularly is this so since the evidence related to the post-affidavit period as well as to the pre-affidavit period.[41] In this connection, it is significant that petitioner failed to adduce any evidence of resignation, notwithstanding the ease with which such evidence could have been adduced by him if he had in fact resigned. It is also significant that petitioner does not challenge the sufficiency of the evidence to submit the case to the jury or to support the jury's verdict.

5. Petitioner also contends (Br. 65–69) that the instruction was vague and misleading in that it did not require the jury to confine its judgment to the accused's conception of membership. This contention, however, ignores other instructions, including the following (R. 414):

> I have said that the Government must prove beyond a reasonable doubt that the defendant made the statement that he was not a member of the Communist Party, willfully, knowing it to be false. By "willfully" we mean "intentionally or deliberately" as distinguished from "accidentally or negligently."

---

[40] There is obviously no basis for petitioner's suggestion (Br. 58–60) that evidence of certain lawful conduct (*i. e.*, being a member of the Communist Party) cannot be used to prove a course of conduct which is relevant to a criminal charge. In any event, petitioner was not tried or convicted for being a member of the Communist Party; instead, the charge is that he deliberately lied about such membership. Indeed, under present law, mere membership in the Communist Party continues to be a lawful activity. Internal Security Act, § 4 (f), 50 U. S. C. 783 (f).

[41] See note 11, *supra*. And cf. *Hupman* v. *United States*, 219 F. 2d 243, 248 (C. A. 6), certiorari denied, 349 U. S. 953; *Fisher* v. *United States*, 231 F. 2d 99, 108 (C. A. 9).

> The statute uses the words "knowingly and willfully falsifies." This means that he deliberately and intentionally made the statement with the knowledge that it was false at the time he made it.

In any event, the issue is not open for review. It was not raised in the trial court, in the court below, or in the petition for certiorari. In these circumstances, the contention comes too late and is not properly before the Court. Rule 30, F. R. Cr. P.; Rule 40 (1) (d) (2), Revised Rules of this Court.[42]

B. INSTRUCTION ON AFFILIATION

Petitioner also attacks the trial court's instruction on affiliation (R. 417):

> I have said that the second count of the indictment contains the same essential element as the first count, except that the charge is that the defendant was affiliated with the Communist Party instead of charging that he was a member of the Communist Party. Webster's New International Dictionary defines "Affiliate" as follows: "To connect or associate one's self with; to adopt, hence usually to bring or

[42] Petitioner (Br. 60–65) also apparently attempts to reopen the constitutional questions resolved in *American Communications Ass'n* v. *Douds*, 339 U. S. 382. In that case, the Court held that § 9 (h) did not violate the First Amendment and that its terms (*e. g.*, "affiliated") were not void for vagueness. In the latter connection, the Court pointed out that 18 U. S. C. § 1001 covers only those false statements made "knowingly and willfully". 339 U. S. at 412–413. In view of the recency of this decision, we know of no reason warranting re-examination of these constitutional questions.

receive into close connection; to ally; to unite or attach such as a member or branch." Affiliation, as used in subsection (h) of Section 159 of Title 29 of the United States Code, means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both.

Now, if you find from all of the evidence that has been offered in this case that each and every essential element of the crime charged in the second count of the indictment as I have stated them to you has been proved to the satisfaction of each and every one of you beyond a reasonable doubt, and you also find beyond a reasonable doubt that the defendant, Clinton E. Jencks, was affiliated with the Communist Party on April 28, 1950, you will then find the defendant guilty of the second count of the indictment. If, on the other hand, you find that Government has failed to sustain the burden of proof beyond a reasonable doubt as to any one or more of these essential elements then you should find the defendant not guilty of the second count of the indictment.

At the outset, it should be noted that false swearing as to membership was charged in Count One, that false swearing as to affiliation was separately charged in Count Two, and that following conviction on both counts like sentences were imposed on each count to run concurrently (R. 467–468). In these circumstances, affirmance of the conviction on either count would require that the judgment of the court below be affirmed. *United States* v. *Sheridan*, 329 U. S. 379;

*Hirabayashi* v. *United States*, 320 U. S. 81; *Brooks* v. *United States*, 267 U. S. 432.

1. Petitioner's contentions that the charge as to affiliation permitted the jury to return a verdict of conviction on the basis of pre-affidavit evidence alone (Br. 75–76) and that the instruction failed to require the jury to confine its judgment to the accused's conception of affiliation (Br. 76) parallel his similar arguments with respect to the charge as to membership. Accordingly they must be rejected for the same reasons (*supra*, pp. 51–53, 54–55).

2. Petitioner's principal attack on the charge as to affiliation (Br. 71–75) is that it did not foreclose conviction on the basis of proof of affiliation with the Party for such of its purposes as may have been wholly lawful. He relies on the decision of this Court in *Bridges* v. *Wixon*, 326 U. S. 135. There the Court held that proof of affiliation, as used in then 8 U. S. C. 137, which provided for the deportation of aliens who are members of or affiliated with any organization that advocates the overthrow by force or violence of the Government of the United States, must show adherence to the unlawful activities of the Party, and that proof of cooperation with respect to activities not themselves unlawful was insufficient to invoke the provisions of the statute.

The *Bridges* case is clearly distinguishable.[43] The statute involved there was expressly operative only

[43] Petitioner relies also upon *Fisher* v. *United States*, 231 F. 2d 99 (C. A. 9). In *Fisher*, the trial court charged that "affiliated" as used in § 9 (h), when applied to the Communist Party has no unusual or different meaning from its normal usage, and defined the term as meaning "To connect or associate one's self with; to

in the event of proof of affiliation with an organization advocating forcible overthrow of the Government. In the instant case, by contrast, it is affiliation on the part of the union officer with the Communist Party, as such, to which the statute has reference, regardless of the revolutionary purposes of the organization. Congress wanted to help sterilize the Party's influence in the labor field, and it was irrelevant to that purpose whether the affiliated union leader agreed with or accepted the Party's objective of violence."[44] See *American Communications Association* v. *Douds*, *supra*, at 393. It may further be noted that it is not affiliation with the Communist Party which is made unlawful by the statute; nothing in the Labor Act makes such affiliation a crime. Petitioner has not been convicted of affiliating with the Party; he has rather been convicted of falsely swearing that he was

---

adopt, hence usually to bring or receive into close connection; to ally" (231 F. 2d at 106). Although holding that this definition did not square with the definition of affiliation in the *Bridges* case, *supra*, the Ninth Circuit did not itself rule as to the correct definition of affiliation for the purposes of § 9 (h). Rather, it said equivocally (231 F. 2d at 108): "If the test of affiliation given in that case [*Bridges* v. *Wixson*] is still applicable, and unless the Government can distinguish the case, this instruction is erroneous." As noted in the text above, we submit that the *Bridges* case is distinguishable in that for the purpose of the particular deportation statute affiliation is adherence to the "unlawful objectives" of the Party, whereas the Labor Act constitutionally provides that the services of the Labor Board are not available to unions whose officers are "affiliated" with the Communist Party for *any* purpose.

[44] Similarly, *Galvan* v. *Press*, 347 U. S. 522, deals with a deportation statute which is concerned with membership in the Communist Party, as such, regardless of knowledge of, or agreement with, its revolutionary aim.

not so affiliated. In the context of this statute, unlike the situation in *Bridges,* the question of affiliation with the Communist Party is separate and distinct from the nature of the objectives of the Party. All that is involved is the close and intimate connection with the Party which "affiliation" connotes.

3. It is urged also (Br. 70–71) that the court's instruction on affiliation was contradictory and confusing because the dictionary definition of the verb "affiliate" comprehends relationships broad enough to include that which exists between an organization and one of its members. Since, however, language must necessarily be understood in context, and since the court immediately qualified the dictionary definition with the statement that affiliation as used in Section 9 (h) imports less than membership but more than sympathy" (*Bridges* v. *Wixon, supra,* at 143), the instruction was sufficiently clear to enable the jury to separate the issues under Counts One and Two. Compare *Fisher* v. *United States, supra.*[45]

## III

### THE JURY WAS PROPERLY CHARGED ON THE ISSUE OF THE CREDIBILITY OF INFORMANTS

Petitioner additionally contends (Br. 77–87) that the trial court did not properly instruct the jury with

[45] It is significant that in *Fisher*, unlike here, the instruction to the jury on affiliation, other than stating the dictionary definition (see *supra*, note 43), did not contain this qualifying statement given above. In holding the instruction to be error, the principal concern of the Ninth Circuit was that one who was only in sympathy with the Party might be convicted of affiliation under that charge (see 231 F. 2d at 107–108).

respect to the credibility to be accorded the Government witnesses who had posed as Communist Party members while in the employ of the F. B. I.

For centuries, governments have considered it necessary to use informants to cope with a number of crimes. Among such crimes are smuggling, bootlegging, narcotics, espionage, and treason. See, *e. g.*, *United States* v. *Rosenberg,* 195 F. 2d 583, 595 (C. A. 2), certiorari denied, 344 U. S. 838. Courts in this country have long adhered to the policy which allows the Government to use otherwise relevant evidence supplied by informants. *Caminetti* v. *United States,* 242 U. S. 470, 495–496; *United States* v. *Dennis,* 183 F. 2d 201, 224–225 (C. A. 2), affirmed, 341 U. S. 494. The use of informants involves solely an issue of credibility.

In this connection, the trial judge instructed the jury as follows (R. 418):

> The witnesses, Jerry W. Ford and Harvey M. Matusow, have testified that for a period of time they received money for services and expenses in furnishing information to the Federal Bureau of Investigation, and you may consider that circumstance when you pass upon the weight and credit which you give them as witnesses, but you are the sole judges of the credibility to be given their testimony. You may take into consideration all the facts and circumstances in determining what weight you shall give their testimony and you are the sole judges thereof.

This instruction clearly informed the jury that Ford and Matusow had received money for services and

expenses while furnishing information to the F. B. I., and that the jury should consider this fact in determining the weight to be accorded their testimony.

Petitioner, however, complains of the trial court's refusal to adopt the precise language of his requested instruction. This instruction (R. 460) would have warned the jury that "If you find that any of the witnesses were employed for money to serve as informers and to make reports as informers to the F. B. I., you should approach their testimony with caution and [weigh] it with great care." It is well settled, of course, that a trial judge is not obliged to adopt the exact language of the instructions requested. *Holt* v. *United States,* 218 U. S. 245, 253; *Sugarman* v. *United States,* 249 U. S. 182, 185. All that is required is that the charge be accurate and that it give to the jury what it needs to reach a verdict. *Wright* v. *United States,* 175 F. 2d 384 (C. A. 8), certiorari denied, 338 U. S. 873. In fact, "[i]t is never 'an absolute necessity' to caution the jury as to the use they may make of informers' testimony." *United States* v. *Dennis, supra,* 183 F. 2d at 225.

Petitioner has erroneously supposed (Pet. 42; Br. 81–82) that *Fletcher* v. *United States,* 158 F. 2d 321 (C. A. D. C.), undertook to lay down an invariable verbal formula to be included in instructions to the jury in cases where informants have testified. *Fletcher* was a narcotics case in which the *sole* evidence against the defendant was the testimony of a single paid addict informant; also, the trial court did not give *any* precautionary instruction concerning informants. The Court of Appeals for the District

of Columbia reversed the conviction, holding merely that instructions should have been given; it did not lay down verbatim instruction to be given in all cases involving informant testimony. By contrast, in this case, in addition to the two informant witnesses with whom this instruction is concerned, six other witnesses gave mutually corrobative testimony as to the activities of petitioner which showed his membership and affiliation with the Communist Party. In addition, the trial court gave adequate instructions concerning the weight to be given to the testimony of informants.

Both Matusow and Ford were subjected to searching cross-examination both on matters relating to the substance of their testimony and on issues of credibility (R. 135–153, 180–198 (Ford); R. 254–295, 303–320 (Matusow)). In a particularly strongly worded argument, petitioner's counsel emphatically urged that the testimony of these two witnesses could not be relied upon because of their character as informants (R. 483–485, 487–491). Under the circumstances, the jury was sufficiently instructed and petitioner was not prejudiced by the instruction given. Once this has been done, it is peculiarly within the competence of the jury which hears the witnesses and observes their demeanor to pass upon the credibility of the witnesses. *Glasser* v. *United States*, 315 U. S. 60, 77; *Collier* v. *United States*, 190 F. 2d 473 (C. A. 6); *Schneider* v. *United States*, 57 F. 2d 454, 457 (C. A. 3); *United States* v. *Levy*, 153 F. 2d 995, 997 (C. A. 3). See *United States* v. *Dennis*, 183 F. 2d 201, 225 (C. A. 2).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
*Solicitor General.*
WILLIAM F. TOMPKINS,
*Assistant Attorney General.*
JOHN V. LINDSAY,
*Executive Assistant to the Attorney General.*
GEORGE ELIAS, JR.,
CLINTON B. D. BROWN,
*Attorneys.*

OCTOBER 1956.

# APPENDIX

## Summary of Proceedings on Petitioner's Motion For a New Trial

On January 28, 1955, while petitioner's appeal from his conviction was pending in the Court of Appeals, petitioner filed in the District Court a motion for a new trial on the ground of newly discovered evidence. Attached to the motion was an affidavit by Harvey Matusow recanting certain statements he had made in his testimony at the trial. These statements, which Matusow's affidavit asserted were "either false or not entirely true at the time I so testified" (H. 7), are as follows (H. 7–12): (1) the statement (*supra,* p. 10) that petitioner had told him "It is a good idea. We can use more active Communists out here"; (2) the statement (*supra,* p. 11) that petitioner had discussed a plan of Mexican Communist organizers to cut off production for the Korean effort; (3) the statement (*supra,* p. 12) that petitioner in his lecture had urged guests at the ranch to read Communist literature; (4) the statement (*supra,* p. 12) that petitioner had characterized the Association of Mexican-Americans as a key organization as far as Communist activities in New Mexico were concerned. Matusow's affidavit also declared (5) that "There was no basis for my stating that [petitioner] was a member of the Communist Party at the time I stated so in Court" (H. 10), but, as already noted (*supra,* pp. 10, 37), Matusow had never made such a statement at the trial. At the hearing on the motion, Matusow elaborated on these denials (H. 25–56).

The Government produced ten witnesses and eighteen exhibits in opposition to the motion. The evidence adduced by the Government may be summarized as follows:

On October 8, 1952, in Salt Lake City, Utah, Matusow testified under oath before a United States Senate Subcommittee in public session (H. 136–141). Matusow, facing Jencks, who was there as a witness under subpoena and who was also under oath (H. 141–144), repeated the substance of his conversation (R. 245–247) with petitioner at the San Cristobal Valley Ranch in 1950 concerning a Communist plan to call a strike to slow copper production and hinder the Korean effort (H. 144). Petitioner was questioned as to this conversation and asked whether he wished to deny Matusow's testimony. On the advice of his counsel, he refused to answer on the ground that his answer might tend to incriminate him (H. 144–145).[1]

On April 20, 1953, before a grand jury in El Paso, Texas, and again on December 4, 1953, before the Texas Industrial Commission at Austin, Texas, Matusow described this same conversation (H. 583–592).

In the fall of 1953, Matusow prepared an outline for a book to be entitled "Blacklisting Was My Business" (H. 201, 206). The outline (G. Ex. 7, H. 213–219) contained no reference to false testimony.

---

[1] At the close of the session of October 8, 1952, Graham Dolan, who was employed by Mine-Mill and who helped to edit the union newspaper, criticized petitioner for having told Matusow anything. Petitioner's reply was: "Well, after all, I was with him at the San Cristobal Valley Ranch * * *. We used to discuss many things * * *. He happened to ask me about the strike. Why the strike. What we intended to do about the strike. I just handed him a line. After all, I had to tell him something. It's nothing to worry about with that phoney. All these hearings, they are not going to prove anything by it anyway." (H. 534.)

During the period from the fall of 1953 to mid-July, 1954, Matusow unsuccessfully attempted to interest various persons and publishing houses to undertake publication of the book (H. 191–248). He testified that he told a number of these people that he had given false testimony under oath (H. 54, 640–642). He named Elmer Davis, the columnist as one such person (H. 54), but retracted this claim on cross-examination (H. 166).[2] He also stated that he had approached Bishop G. Bromley Oxnam. (H. 185–189.) Subsequently, when questioned about his conversation with Bishop Oxnam by the House Un-American Activities Committee in Washington, D. C., on July 12, 1954, Matusow denied ever saying that he had lied under oath (H. 178, 188).

In the summer of 1954, Nathan Witt, attorney for petitioner and general counsel for Mine-Mill, drafted a motion for a new trial for petitioner, and submitted his papers to E. B. Elfers and John McTernan, other attorneys for petitioner (H. 776). It was determined that the motion "wasn't strong enough" and it was abandoned (H. 776–777, 798). On September 13 or 14, 1954, Witt and McTernan conferred in New York City regarding the motion. They agreed that Matusow would be essential to the motion and decided that

[2] To substantiate his recantation, Matusow claimed that a letter which he had written to Senator McCarthy on August 24, 1953, was a confession to the Senator that he had given false testimony (H. 63–65). Actually, the letter reaffirmed the honesty of his relations with the Government (G. Ex. 1, H. 59–61). Matusow likewise claimed that an affidavit (G. Ex. 4, H. 168–172) he gave to the *New York Times* was a retraction of some of his sworn testimony (H. 53). On cross-examination, he admitted that the affidavit was actually a justification and explanation of his estimates concerning that newspaper and reaffirmed his belief that his estimates had been true (H. 168–175).

rather than approach him directly they should aid him in finding someone to publish his book (H. 798).

On or about September 21, 1954, Witt discussed the problem with John Clark, president (H. 434), Orville Larson and Ausbury Howard, vice presidents (H. 435), and Maurice Travis, secretary (H. 435), of the Mine-Mill Union, at a meeting held at the Grand Hotel in Butte, Montana (H. 437, 438, 443–445). These officers authorized Witt to expend $1,000 to assist in the publication of Matusow's book (H. 445, 456–457, 778–780, G. Ex. 18). This method was used because they were afraid the Department of Justice would try to find something wrong in their activities in attempting to get the "truth" from Matusow (H. 799).

Shortly after Witt's return to New York, he had a conference with petitioner and Albert E. Kahn (H. 774, 779). They agreed that Kahn's firm of Cameron and Kahn, Inc., would undertake to publish Matusow's book with money furnished by the Union through Witt (H. 779–780).[3] Witt advanced $200 to $250 to Kahn to defray the expense of locating Matusow (H. 780). Matusow was not aware of any of these arrangements, and Kahn was instructed by Witt not to reveal Witt's connection until the appropriate time (H. 801).[4]

---

[3] This is the same Albert E. Kahn who was accused of being a Communist Party member by Matusow in June, 1954 (H. 274).

[4] During this time, Matusow was living in Dallas, Texas, and was reduced to selling programs in the lobby of the Melba Theatre (H. 281). While in Dallas, he received a message from his parents in New York that a Mr. Cameron was trying to locate him (H. 298). In mid-October, he left Dallas on a hiking trip to Salt Lake City. He intended to prospect for uranium with some friends (H. 302–303, 686). At this time, his total financial resources were from $40 to $70 (H. 300). On about October 21, 1954, he arrived in Taos, New Mexico, where he traded his bi-

On October 22, 1954, Matusow told two Mormon missionaries that he had worked against the Communist Party at a dude ranch near Taos, New Mexico (H. 760–761). On the morning of October 23, although he had had no previous contact with Kahn (H. 320), Matusow attempted to place a long distance telephone call from Taos, New Mexico, to Kahn's residence (H. 714, 725). He subsequently contacted Kahn at his office and arranged to be furnished air transportation to New York (H. 326). On the same day, Matusow invited Riley Taintor to have dinner with him. During the dinner Matusow stated that he had received an advance of $1,000 from his publishers and displayed a large roll of bills (H. 736–737). Matusow denied receiving any money while in Taos (H. 686). The following day, Matusow flew from Albuquerque, New Mexico, to New York City. While waiting for his plane in Albuquerque, Matusow remarked to the ticket agent that he was going to New York to write a book, and he commented: "No; they are not interested in the truth but as long as they will pay for it I will write anything" (H. 546–547).

Matusow met Kahn and Cameron in New York City on October 25, 1954, to discuss publication of his book (H. 378). A contract (Govt. Exs. 15 & 16, H. 383–395) for the writing and publication of the book was entered into between Matusow and the firm of Cameron and Kahn the next day (H. 395, 427). It was agreed that Matusow would receive an advance payment of $1500 (H. 390).

The subject matter of the book Matusow had planned to write was dictated into a recording machine (H. 404). Kahn was present and occasionally asked questions to develop the story more fully (H.

---

cycle for a room (H. 321). He also borrowed $10 from Doughbelly Price (H. 327).

404–405). In the course of this procedure, Matusow stated to Kahn:

> I knew Jencks was a party member and I said so. I can't say here that Jencks wasn't a Party member after he signed the affidavits because I know that he was * * * [G. Ex. 28; H. 693–694].[5]

During this time, Kahn was in constant communication with Witt and kept him informed of the progress of the project (H. 781). He delivered copies of the typed recordings to Witt at his office as they were completed (H. 781–782). When the recording was completed in mid-December, 1954, Matusow was formally introduced to Witt (H. 406, 783–784). Exactly what occurred between them is not fully covered by the evidence. However, the outcome was that Matusow agreed to make an affidavit on behalf of petitioner (H. 785–788).[6]

Shortly after his interview with Kahn, a chapter of the book concerning the *Jencks* trial was written (H. 784–787). Witt took the draft of this chapter to Denver on January 3, 1955 (H. 787), and it was discussed at a meeting of Mine-Mill officials (H. 793). Witt advised the union officials that he expected Matusow to make an affidavit on petitioner's behalf (H. 793).

---

[5] This does not appear in the book as it was finally published (H. 694–700), although in the original draft Matusow again referred to Jencks as a Communist Party member (G. Ex. 23A; H. 682–683).

[6] Following this interview, Matusow was advised by Witt that it would be difficult for the Government to prosecute him for perjury on the basis of contradictory statements. Witt further suggested that the Government would not want to prosecute Matusow because it would affect other cases (H. 352–355).

Thereupon he was instructed to contact Kahn and arrange for a bodyguard to protect Matusow (H. 793–794).

Matusow wrote a draft of his proposed affidavit of recantation on January 17, 1955 (H. 121–126, 790). Witt had previously supplied Kahn with a copy of the record of the case (H. 781–782). The final form of the affidavit was executed on January 20, 1955 (H. 788, 813). The affidavit was filed in the District Court on January 28, 1955 (H. 2, 4). No investigation was undertaken by the union with reference to the reliability of Matusow's recantation (H. 479, 487).[7]

The International Office of the Mine-Mill Union undertook to purchase 7,000 copies of Matusow's book at a cost of $3,250. This figure does not cover the number of copies which the local unions might undertake to purchase (H. 508). In addition, the Canadian branch of the Union promised that they would purchase 5,000 copies (H. 508–509).

On direct examination at the hearing, Matusow stated that he had never told anyone that he had lied in the *Jencks* case before he met Albert E. Kahn, his publisher (H. 272–273).

At the hearing, no evidence was adduced by petitioner in support of the motion other than the testimony of Matusow. Upon due consideration of all the evidence, the trial court denied the motion for a new trial on March 12, 1955 (H. 825–826).

On appeal, the Court of Appeals affirmed (H. 833), holding (a) that the evidence supported the trial

[7] On January 29, 1955, at a Mine-Mill Union Defense Fund Conference in El Paso, Orville Larson, a vice-president of the Union, urged a drive to discredit all Government witnesses in Communist cases (H. 804–805).

court's finding that Matusow testified truthfully at the trial and that his recantation was false (H. 842), and (b) in any event, that "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow" and "that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness" (H. 844).

U. S. GOVERNMENT PRINTING OFFICE: 1956